TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~565.~~ 1044

THE UNITED STATES, PLAINTIFFS IN ERROR,

vs.

ANNIE FOX, JOSEPH FOX, GEORGE FOX, BENJAMIN N. DISBROW, DAVID HAYS, AND A. H. BRUMMEL.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

FILED OCTOBER 8, 1874.

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1 UNITED STATES OF AMERICA:

The President of the United States of America to the honorable the judges of the court of appeals of the State of New York, to the honorable the judges of the supreme court, county of New York, and to the surrogate of the county of New York, greeting:

Whereas in the record and proceedings, as also in the rendition of a judgment of a plea, which is in the said court of appeals before you, or some of you, being the highest court of law and equity of said State in which a decision could be had in the said suit between the United States of America, plaintiff, and Annie Fox, Joseph Fox, George Fox, Benjamin N. Disbrow, David Hays, and A. H. Brummel, defendants, wherein was drawn in question the validity of an authority exercised under the United States, to wit: The authority of the Secretary of the Treasury, or other proper officer of the United States, to receive, on behalf of the United States, the property, real and personal, bequeathed and devised to the United States by one Charles Fox, now deceased, and the decision was against the validity of such authority; and wherein was drawn in question the validity of a statute of the State of
2 New York, as against the United States, on the ground of its being *repayment* to the Constitution of the United States, and the decision was in favor of its validity;

And wherein was drawn in question the construction of the Constitution of the United States, in respect to its authorizing the said United States to take real estate devised to it, and the decision was against the title to said real estate set up and claimed under said Constitution and said will, a manifest error hath appeared, to the great damage of the said United States, as by its complaint appears; we being willing that the error, if any hath been, should be duly corrected, and full and speedy justice be done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court then and there to be held, that the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and
3 customs of the United States should be done.

Witness the honorable Nathan Clifford, associate justice of the said Supreme Court, this thirteenth day of October, in the year of our Lord one thousand eight hundred and seventy-three.

[SEAL.] KENNETH G. WHITE, *Clerk, &c.*

4 (Indorsed:)
Within writ allowed.

WARD HUNT,
Asso. Just. Sup. Ct. U. S.

Filed Dec. 9, 1873.

5 UNITED STATES OF AMERICA:

To Annie Fox, Joseph Fox, and George Fox, Benjamin N. Disbrow, David Hays, and A. H. Brummell, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washing-

ton, on the second Monday of October next, pursuant to a writ of error filed in the office of the clerk of the supreme court, county of New York, at the city of New York, wherein the United States of America are plaintiffs in error and you are defendants in error, to show cause, if any there be, why a judgment in the said writ of error mentioned should not be cancelled and speedy justice by done to the parties in that behalf.

Witness the Hon. Ward Hunt, justice of the Supreme Court of the United States, at Washington, this tenth day of December, one thousand eight hundred and seventy-three.

WARD HUNT,
Associate Justice Sup. Court U. S.

6 (Indorsed :) U. S. Supreme Court. The United States of America vs. Annie Fox et al. Citation. Edwards Pierrepont, of counsel for plaintiffs in error. John M. Corney, attorney for plffs. in error.

Due and timely service of within citation is hereby admitted.

Dated New York, Dec. 12, 1873.

PINCKNEY & SPINK,
Attys. for the Exrs., Hays & Brummell.
J. SOLIS RITTERBAND,
Atty. for the Executors.
JAS. FLYNN,
Atty. for Guardian ad litem of Infant Respondents, Anne Fox, Joseph Fox, & George Fox.

7 Supreme Court of the United States, of October term, in the year of our Lord one thousand eight hundred and seventy-four.

THE UNITED STATES OF AMERICA
vs.
ANNIE FOX ET AL.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States at the capital, in the city of Washington, come the Attorney-General of the United States and Edwards Pierrepont, special counsel of the United States on behalf of the said United States, and say that in the record and proceedings aforesaid there is manifest error, in this, to wit, that by the record aforesaid it appears that the right of the United States to take and hold the real estate devised to the United States by one Charles Fox, now deceased, and the authority of their proper officer to receive said real estate on their behalf were called in question, and the decision was against such right and such authority, whereas it should have been in favor of such right of the United States, and such authority of its

8 proper officer; there is also error in this, to wit, that it further appears in the record aforesaid that the validity of a certain statute of the State of New York, as against the United States, as construed by its courts, was drawn in question on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of said statute as construed, and to the effect that the United States, a sovereign body politic, cannot receive and hold the said real estate devised as aforesaid, whereas the said decision should have been against the validity of said statute so construed and in favor of the United States; there is also error in this, to wit, that it appears by the record aforesaid that there was drawn in question the construction

of the Constitution of the United States in respect to its authorizing the said United States to take real estate devised to them, and the decision was against such authority and against the title of the United States to the real estate devised as aforesaid, whereas the said decision should have been in favor of such authority and sustaining the title of the United States to said real estate; there is error also in this, to
9 wit, that by the record aforesaid it appears that the will of said Charles Fox, deceased, devising real estate as aforesaid, was decreed invalid and void as to real estate, whereas it should have been decreed a valid will of real estate; there is error also in this, to wit, that it appears by said record that it was adjudged and decreed that the United States of America is not entitled to and cannot lawfully take, receive, hold as devisee in trust or otherwise, under said last will and testament, the real estate devised thereby or any part thereof, whereas said decree should have been in favor of said The United States; and there is error also in this, to wit, that it was decreed that the real estate of said Charles Fox descends to his heirs at law; and there is also error in this, to wit, that the said will was admitted to probate as a will of personal estate only, whereas it should have been admitted as a will of both personal and real estate; there was error in not holding that the said real estate was, by the operation of the provision of the said will and of the law, as intended by the testator, converted into personal estate and paid to the United States as such.

10 And the said Attorney-General and the said Edwards Pierrepont, special counsel of the United States, in behalf of said United States, prays that the judgment aforesaid may be reversed, annulled, and altogether held for nought, and that the said United States may be restored to all things which they have lost by occasion of said judgment.

GEO. H. WILLIAMS,
Atty. General.

EDWARDS PIERREPONT,
Special Counsel.

(Indorsed:) Supreme Court of the United States. The United States of America vs. Annie Fox et al. Assignment of errors.

11 The answer of the judges of the supreme court of the State of New York, for the first judicial district, the same being a court of record.

A transcript of the record and judgment of this court, together with all things touching or in any wise concerning the same.

We certify under the seal of our said court to the justices of the Supreme Court of the United States as within it is commanded.

By the court:
[SEAL.] WM. WALSH, *Clerk.*

12 Court of appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals held at the capital, in the city of Albany, on the 6th day of May, in the year of our Lord one thousand eight hundred and seventy-three, before the judges of said court.

Witness the Hon. Sanford E. Church, chief judge, presiding.

E. O. PERRIN, *Clerk.*

Remittitur.—May 9, 1873.

In the matter of the alleged last will & testament of Charles Fox, deceased.

THE UNITED STATES OF AMERICA, APPELLANTS,
against
ANNIE FOX, JOSEPH FOX, CHARLES FOX,
13 Benjamin N. Disbrow, David Hays, and
A. H. Brummell, respondents.

Be it remembered that, on the 30th day of December, in the year of our Lord one thousand eight hundred and seventy-two, the United States of America, the appellant in this action, came here into the court of appeals, by John M. Cooney, its attorney, and filed in the said court a notice of appeal and return thereto from the judgment of the general term of the supreme court of the first judicial department of the State of New York.

And Fox & others, the respondents in said action, afterwards appeared in said court of appeals, by James Flynn, Pinkney & Spink, & J. Solis Ritteland, their attorneys.

Which said notice of appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon the said court of appeals, after hearing this action argued by Mr. Edward' Pierrepont, of counsel for the appellant, and by Mr. James Flynn, of counsel for the respondents, and after due de-
14 liberation had thereon, did order and adjudge that the judgment of the supreme court appealed from in this action be in all things affirmed.

And it was further ordered and adjudged that the respondents recover against the appellants costs of appeal to this court.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the said supreme court, there to be proceeded upon according to law.

Therefore it is considered that the said judgment be in all things affirmed, with costs as aforesaid, and stand in full force, strength, and effect.

And hereupon, as well *as* the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid by them given in the premises, are by the said court of appeals remitted unto the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and pro-
15 vided, to be enforced according to law; and which record now remains in the said supreme court before the justices thereof, &c.

CORS. TEN BROECK,
Deputy Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE.
Albany, May 9, 1873.

I hereby certify that the preceding record contains a correct transcript of the proceedings in the court of appeals, with the papers originally filed therein attached thereto.

[L. S.] CORS. TEN BROECK,
Deputy Clerk.

16 County of New York, surrogate's court.

To the surrogate of the county of New York:

The petition of the United States of America, by Edwards Pierrepont, U. S. district attorney for southern district of New York, of the city of New York, respectfully showeth:

That your petitioner is the sole legatee named in the last will and testament of Charles Fox, late of the county of New York, deceased; that the said deceased was, at or immediately previous to his death, an inhabitant of the county of New York, and departed this life, in said county, on the second day of February, 1870, and that said last will and testament relates to both real and personal estate.

Your petitioner further shows that the only heirs and next of kin of said deceased are as follows:

Niece, Anne Fox, aged ten years.
Nephew, Joseph Fox, aged nine years.
" George Fox, aged one year.
Children of James Fox, deceased, residing at 36 Ryerson street, Brooklyn.
Cousin, Eliza Jane Alphonse, residing at 273 Delancey street, New York City, of full age.

That said minors, Anne Fox, Joseph Fox, and George Fox, have a guardian, B. N. Disbrow, residing at Yorktown, Westchester County, in the State of New York; that said deceased left no widow or child,
17 or children of any deceased child, other niece, nephew, or other cousin, him surviving; that the estate and effects for or in respect of which the probate of said will is applied for, do not exceed in value the sum of one hundred thousand ($100,000) dollars.

Your petitioner therefore prays that the said last will and testament may be proved, and letters testamentary granted thereon according to law.

EDWARDS PIERREPONT,
Attorney of the United States, Southern District N. Y.

CITY AND COUNTY OF NEW YORK, *ss:*

I, Edwards Pierrepont, the petitioner named in the foregoing petition, being duly sworn, do depose and say that I have read the foregoing petition, to which I have subscribed my name, and know the contents thereof, and that the matters of fact therein stated, of my information and belief, I believe to be true.

EDWARDS PIERREPONT.

Sworn this 12th day of February, A. D. 1870, before me,
BENJ. K. PHELPS,
Notary Public.

In the name of God, amen: I, Charles Fox, of the city and county of New York, in the State of New York, being of sound mind and memory, and considering the uncertainty of this frail and transitory life, do therefore make, ordain, publish, and declare this to be my last will and testament, that is to say:

First. After all my lawful debts are paid and discharged, the residue of my estate, real and personal, I give, bequeath, and dispose of as follows, to wit: To the Government of the United States at Washing-
18 ton, District of Columbia, for the purpose of assisting to discharge

the debt contracted by the war for the subjugation of the rebellious Confederate States, the property located on Third avenue, viz, the front house and lot known as No. 515 Third avenue, and the four-story house on the rear of said lot, also known as No. 515 Third avenue; likewise I give and bequeath the house and lot No. 517 Third avenue; all my piece of land on Fisk avenue, in Queens County and town of Newtown, consisting of or containing $1\frac{49}{100}$ acres; also forty acres of land in the State of Iowa, Lime County, location N. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$ 9.86 6.40 acres; likewise the one-half of house and lot No. 15 Pitt street; also the one-half of forty acres of land located by my mother in Lime County, State of Iowa, S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ 7.86 5.40 acres; likewise I make, constitute, and appoint David Hays and A. H. Brummell to be executors of this my last will and testament, hereby revoking all former wills by me made.

In witness whereof I have hereunto subscribed my names and affixed my seal.

CHARLES FOX. [L. S.]

The above written instrument was subscribed by the said Charles Fox, in our presence, and acknowledged by him to each of us, and he, at the same time, published and declared the above instrument so subscribed to be his last will and testament, and we, at the testator's request, and in his presence, have signed our names as witnesses hereto, and written opposite our names our respective places of residence.

A. H. BRUMMELL,
416 *Grand Street, N. Y.*
DAVID HAYES,
258 *Henry Street.*

JULY 16TH, 1864.

19 The people of the State of New York, by the grace of God free and independent, to Eliza Jane Alphonse, of full age, residing in the city of New York, and Anne Fox, Joseph Fox, and George Fox, minors residing with their mother in the city of Brooklyn, New York, B. N. Disbrow, of Yorktown, Westchester County, being their general guardian, the heirs and next of kin of Charles Fox, deceased, send greeting:

Whereas the United States of America, by Edwards Pierrepont, U. S. district attorney for southern district of New York, has lately applied to our surrogate of the county of New York, to have a certain instrument in writing, relating to both real and personal estate, duly proved as the last will and testament of Charles Fox, late of the city of New York, deceased; therefore you, and each of you, are cited to appear before our said surrogate, at his office, in the city of New York, on the 26th day of February, instant, at ten o'clock in the forenoon of that day, then and there to attend to the probate of the said last will and testament.

In testimony whereof, the surrogate of our said county has hereunto affixed his seal of office, the 12th day of February, one thousand eight hundred and seventy.

[L. S.] MORGAN A. DAYTON, JR.,
Clerk to the Surrogate's Court.

CITY AND COUNTY OF NEW YORK, *to wit:*

John C. Keating, of said city, being duly sworn, says that he made

personal service of the foregoing original citation on the following-
20 named persons, in said citation mentioned, by exhibiting to each of them the said original citation, and delivering to each of them a copy thereof, as follows, that is to say, on the said Eliza Jane Alphonse, on the 15th day of February, 1870, and on Anne Fox, Joseph Fox, and George Fox, on the 16th day of February, 1870.

JOHN C. KEATING.

Sworn to this 21st day of February, 1870, before me,

WM. W. SMITH,
Assistant to Surrogate.

CITY AND COUNTY OF NEW YORK, *ss:*

Benjamin Disbrow, of Yorktown, in the county of Westchester, being duly sworn, says that he hereby admits of due and timely service of the within citation, and waives any irregularity in the mode thereof.

BENJ. N. DISBROW.

Sworn to before me, this 26th day of February, 1870.

MORGAN A. DAYTON, JR.,
Assistant to Surrogate.

21 Surrogate's court, county of New York.

IN THE MATTER OF THE PROBATE OF A PAPER-writing propounded as the last will and testament of Charles Fox, deceased.

Before Hon. R. C. Hutchings, surrogate.

For proponents and legatees, the United States of America, John M. Cooney, proctor; Edwards Pierrepont, of counsel.

For executors, J. Solis Ritterband and Pinckney & Spink, proctor and counsel.

For infant contestants, Anne Fox, Joseph Fox, and George Fox, Benjamin N. Disbrow, guardian ad litem; James Flynn, proctor for guardian ad litem; A. J. Vanderpoel, of counsel.

22 At a special term of the supreme court, held at chambers thereof, at the court-house, in the city and county of New York, on the 14th day of November, 1871.

Present, John R. Brady, justice.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
ANNE FOX, JOSEPH FOX, GEORGE FOX, BENJAMIN N. DISBROW, DAVID HAYS, and A. H. BRUMMELL, respondents. } Supreme court.

On reading and filing the petition of Benjamin N. Disbrow, one of the above-named respondents, and general guardian of the above-named respondents, Anne Fox, Joseph Fox, and George Fox, minors, under the age of fourteen years, and on motion of James Flynn, attorney for said petitioner, ordered that Benjamin N. Disbrow, residing at Brooklyn, in the county of Kings, be, and is hereby, appointed guardian ad litem of the said Anne Fox, Joseph Fox, and George Fox, for the special purpose of taking charge of the rights and interests of said infants,

and of each of them, on the appeal herein, and to protect and defend the same, on his executing to the people of this State, and duly acknowledging and filing, a bond in the penalty of five hundred dollars, with one sufficient surety, to be approved by a justice of this court, and conditioned as required by the statute and practice of this court.

A copy.

CHAS. E. LOEW, *Clerk.*

23 60 WALL STREET, NEW YORK, *Feb.* 16, 1870.

Hon. ROBERT C. HUTCHINGS,
Surrogate of the City and County of New York:

SIR: I hereby notify you, and all others concerned, that I appear as attorney and counsel for B. N. Disbrow, esq., guardian of Anne Fox, Joseph Fox, and George Fox, minors and heirs at law of Charles Fox, late of said city and county, deceased, to contest in their behalf, and I do hereby contest, the validity of the alleged last will and testament of said deceased, offered for probate before you, also that I object to the admission thereof.

Very respectfully,

JAS. FLYNN.

DAVID HAYS, called for proponents:

(Counsel for special guardian objects to the witness on the ground that he is incompetent, being an executor. Objection overruled. Exception taken.

Counsel for special guardian raises the further objection that the statute excludes witness under the term "appointment." Objection overruled. Exception taken.)

Witness sworn.

Direct examination by Mr. Ritterband:

Q. Where do you reside?
A. I reside at present in East Sixty-fifth street.
Q. Where do you do business?
A. No. 207 Division, corner of Clinton, in the city of New York.
24 Q. How long have you done business at 207 Division street?
A. Fifteen years.
Q. Did you know Charles Fox in his life-time?
A. I did.
Q. How long had you known him prior to 1864?
A. Several years.
Q. Do you know where he lived in 1864? and, if so, state it.
A. He lived in Pitt street, near Grand; I don't know the number.
Q. In this city?
A. Yes, sir.
Q. That is in your neighborhood?
A. Yes, sir.
Q. Did you see him frequently during the year 1864?
A. Very frequently.
Q. Do you recollect seeing him in the month July of that year?
A. Yes, sir.
Q. Look at that paper, and say if you ever saw it before? (the one propounded.)
A. Yes, sir.
Q. Do you recollect when and where you first saw it?

A. I saw that paper in Mr. A. H. Brummell's store, in Grand street, in this city.

Q. Who is Mr. Brummell?

A. He is the other witness.

Q. Look at that signature "Charles Fox;" did you see that written there?

A. Yes, sir.

Q. By whom?

A. Charles Fox.

Q. Can you state when you saw it written?

A. I could not positively; I think it was about this time in July—July 16th, 1864.

Q. Is that the date you find on the will?

25 A. Yes, sir.

Q. Where did you see that signature written?

A. In Mr. Brummell's store in Grand street, this city.

Q. Who was present?

A. Mr. Brummell, myself, and Mr. Fox.

Q. At the time that Mr. Fox signed that will, did he say anything about it? and if so, state what he said.

A. He said it was his last will and testament.

Q. Anything else? did he make any request?

A. He requested us to be witnesses to his last will and testament.

Q. Whom?

A. Mr. Brummell and myself.

Q. Requested you to be witnesses?

A. Yes, sir.

Q. That was at the time he signed it?

A. Yes, sir.

Q. What did you do then?

A. I signed my name after Mr. Brummell.

Q. As a witness?

A. As a witness.

Q. What did Mr. Brummell do, if anything?

A. Mr. Brummell signed at the same time.

Q. Is that your signature?

A. That is my signature.

Q. Was Mr. Fox present when you and Mr. Brummell signed the paper?

A. Mr. Fox was present.

Q. Did you see Mr. Brummell sign it?

A. I did.

Q. Did Mr. Brummell see you sign it?

A. I presume he did.

Q. About how old was Mr. Fox at this time?

A. He was in the neighborhood of fifty years—maybe a little over.

Q. What was the condition of Mr. Fox's mind at the time he executed this instrument?

(Objected to; objection overruled; exception taken.)

26 A. Perfectly sound.

Q. Did you observe any indication of undue influence or restraint at the time he signed it?

A. I did not.

Cross-examination by Mr. Flynn:

Q. Do you know who wrote this instrument?

A. No, sir,
Q. How did you happen to meet in that store; were you sent for?
A. I went with Mr. Fox, at his request, to Mr. Brummell's store to sign the will.
Q. Who was present besides yourself, Mr. Fox, and Mr. Brummell?
A. No one that I know of; I don't know of any one but us three.
Q. You say you saw him sign the will?
A. I saw Mr. Fox sign his will.
Q. And what did he say then?
A. He wanted us to be witnesses to his last will and testament.
Q. What did he say?
A. He said it was his last will and testament.
Q. What did he do then; had he signed before or after that?
A. He signed his name and we signed as witnesses.
Q. Was he present when you signed the paper?
A. He was present.
Q. Did he see you?
A. I presume he did.
Q. Was he in the store?
A. He was by, present. I said that before.
Q. Will you swear that he did or could have seen you sign your name?
A. I will swear that he was by when we signed.
Q. Will you swear he did or could have seen you when you signed your names?
A. Yes, sir.
27 Q. You stated he was perfectly sound; tell us how you know that. Are you a doctor?
A. No, sir.
Q. Tell us how you know he was perfectly sound.
A. We knew it; it's the way we judge people generally. I saw nothing unsound about the man.
Q. That is the only way you knew?
A. That is the only way; did not examine him.
Q. What did he do in relation to this will at the time he executed it, besides asking you to witness it?
A. That it was his last will and testament.
Q. Did he say anything in reference to the fact that he gave his property to the United States Government?
A. No, sir.
Q. Do you know what the will contained at the time you signed it?
A. No, sir.
Q. Had he said anything at all at that meeting about any of his relatives; do you recollect his saying anything?
A. No, sir; not at that meeting.
Q. What was done with the will after he signed it?
A. He gave the will to me after if was signed, in an envelope.
Q. How long did you keep it?
A. It was in my office two years—in the neighborhood of two years.
Q. He took it away subsequently?
A. Yes, sir.
Q. What did he say when he took it away?
A. He said he would make some alterations in it and return it.
Q. You had not seen any will of his subsequent to this?
A. No, sir.

28 Q. Do you know whether he made any other will subsequently?

A. No, sir.

Q. Have you ever heard him say anything, at any time, in relation to any member of his family?

(Objected to as immaterial. Question withdrawn.)

Q. Have you ever heard him say he would not leave a dollar of his property to any member of his family?

(Objected to. Question waived for the present.)

Q. How long before he came to this store, with this will, did you know he had made a will?

A. A moment before. As he came in the store, he told me he had made the will.

Q. At the time of the execution of this will, could you tell us the language that was used there?

(Objected to, that the question has already been answered.)

Q. Could you tell the exact language that was used?

A. No, sir; no more than one part of the language; what other was spoken about I have no recollection.

Q. Have you been spoken to in relation to your testimony that you are to give here in relation to this matter?

A. No, sir.

Q. You have not spoken to any one about it?

A. No, sir.

29 ADONIJAH H. BRUMMELL, called for proponent.

Direct examination by Mr. Ritterband:

Q. Where do you reside?

A. My residence now is 231 Henry street.

Q. Where is your place of business?

A. No. 416 Grand street.

Q. Where was it in the year 1864, in the month of July?

A. At the same place, same number, and same street.

Q. No. 416 Grand street, in this city?

A. Yes, sir.

Q. Did you know Charles Fox in his life-time?

A. Yes, sir.

Q. Did you know him in July, 1864?

A. Yes, sir.

Q. How long had you known him previous to 1864?

A. Well, several years—four or five years.

Q. Did you see him in the month of July, 1864?

A. Yes, sir.

Q. Did you see him on the 16th of July, 1864, or about that time?

A. About that time.

Q. Where did you see him?

A. In my store.

Q. Look at that paper (the one propounded) and say whether or not you have ever seen it before?

A. Yes, sir; I have seen this paper before.

Q. Can you state when, and where, you first saw it?

A. I think the first time I saw it was in my store.

Q. When; what year?

A. It was about the date of the will, July 16th, 1864.

30 Q. Look at the signature opposite the seal—"Charles Fox"—did you see that written?

A. I think I did.
Q. By whom?
A. Charles Fox.
Q. When and where?
A. In my store, on the 16th of July, 1864, at the time we signed.
Q. Who else was present at the time besides yourself and Mr. Fox?
A. Mr. David Hays, the other witness.
Q. Did Mr. Fox come to your store with Mr. Hays?
A. He came there with Mr. Hays.
Q. State what he said at the time he signed that will.
A. He said that it was his last will and testament, and asked us to be witnesses to it—subscribing witnesses to his last will and testament—and we gave our consent and done so.
Q. Did he sign it then?
A. He did, to the best of my recollection.
Q. Did you sign it?
A. Yes, sir.
Q. Is that your signature?
A. Yes, sir.
Q. Were Mr. Fox and Mr. Hays present when you signed it?
A. Yes, sir.
Q. Did you sign it in the presence of Mr. Fox and Hays?
A. Yes, sir; we were all together.
Q. Did you see Mr. Hays sign it?
A. Yes, sir.
Q. What was the condition of Mr. Fox's mind at the time he executed that instrument?
A. I considered his mind sound—that he was a sane man.
Q. Did you observe any indication of undue influence or restraint, at the time he signed it?
A. No, sir; not at all.

31 Cross-examination by Mr. Flynn:

Q. Will you swear you saw him write his name there?
A. Yes, sir.
Q. And he requested you to be witnesses?
A. Yes, sir.
Q. And he acknowledged it to be his last will and testament?
A. Yes, sir.
Q. Have not you stated since the decease of this man, Fox, that he was insane?
A. No, sir.
Q. You have not?
A. No, sir.
Q. To anybody?
A. I said no.
Q. Did not you state to George K. Chase that he was insane?
(Objected to; objection overruled; exception taken.)
A. No, sir.
Q. Will you give us your reason for believing that he was sane?
A. By talking with him, being acquainted with him some years. I considered him considerably above ordinary men in the way of intelligence. I never had the slightest idea that the man was insane at all.
Q. Did he talk about the devise of this will at the time he made it?
A. Not to me.
Q. Did he talk over the subject of the will—the devise to the Government?

A. No, sir; not to me.
Q. Do you know whether or not he made a subsequent will?
A. I don't know.
32 Q. Did he tell you so?
A. No, sir; he never told me anything about it.
Q. Did you tell Mr. George K. Chase that Mr. Fox informed you that he had made a subsequent will?
A. I don't know as I am acquainted with George K. Chase. I may know him, but I don't remember.
Q. Since the decease of Mr. Fox, did you tell Mr. George K. Chase that Mr. Fox had made a subsequent will in writing?
A. No.
Q. Did Mr. Fox tell you that this will was destroyed?
A. No, sir; he never told me that the will was destroyed.
Proponent rests.

Adjourned until Monday, March 7th, 1870, at two o'clock.

NEW YORK, *March* 7, 1870.

EPURAZYRA MURAWSKI, called for contestant, sworn.

Direct examination by Mr. Flynn:

Q. Where do you reside?
A. No. 553 Third avenue; the old number was 517.
Q. One of the houses owned by Mr. Fox?
A. Yes, sir.
Q. Did you know Charles Fox in his life-time?
A. I have known him going on thirteen years.
Q. How long have you been a tenant of him?
A. Going on thirteen years.
Q. Were you well acquainted with him?
A. Yes, sir; he used to be in my place most of the time.
33 Q. Have you had a number of conversations with him?
A. Many times.
Q. From your acquaintance and conversation with Mr. Fox, in the spring of 1864, or at any time previous, did you know of any facts or circumstances happening about that time which led you to form any opinion respecting his sanity?
(Objected to.)
Q. Will you describe his conduct then?
A. Yes, sir.
Q. What was it?
A. This was before 1864?
Q. Yes.
(Objected to as being too remote from the making of the will.)
Q. In the spring of 1864, or about that time?
A. Yes, sir. Shortly before he moved up town he came into my store one day. He seemed to be very much alarmed; said that a set of thieves was coming into his place at night, and stood in the corner of his room, and watching for him a couple of hours. He said he lived in Pitt street. Then he watched for them with his gun in his hand, and he fired, and he found that it was a cat running along the yard.
Q. Anything else about that time?
A. About that time I don't remember anything more, with the exception when he moved up town he had a great many ways about him. He would come in sometimes screaming and hallooing, and would rush

out again, and come back as good as he was before; and he came into a lady's room up stairs, one time, to collect her rent.

Q. (By the surrogate.) Were you present?

34 A. Yes, sir; and he hallooed "murder." All our neighbors came out. He said the woman locked him in her room.

Q. Did she lock him in her room?

A. She did not—just shut the door; he came out in the hall and hallooed, "Murder."

Q. Do you recollect anything about a ghost story that he used to tell?

A. Yes, sir.

Q. What about that?

A. He told me one time he walked as far as the Cooper Institute some years ago, and he fell asleep.

Q. How long ago was it?

A. That was the same time when he was telling the story.

Q. How many years ago.

A. About six or seven years ago; it must be at least that. Before he moved up town, when he lived in Pitt street, this happened. He fell asleep and slept there; he did not know whether a couple of hours or more. When he waked up he found there was a big grave dug right alongside of him, and an old gentlemen came along and told him he was lost, and he fetched him in the straight road to go to Division street—with long white hair. He never seen the man before.

Q. Do you know anything about a cat that he used to hold conversation with in Pitt street?

A. He used to tell that to my children—that he used to have a cat climb up a pole.

Q. Were you present?

A. Yes, sir.

Q. Did he appear to be in earnest?

A. We did not know what to make of the man talking to the children; the cat tried to talk to him.

Q. What did he say to the cat?

A. He said the cat had no teeth, and it was fairly talking to him; it would climb up a pole, and it stood on the top of the pole, the cat trying to talk to him.

Q. Do you know anything in connection with a water-closet;

35 A. Yes, sir; he used to come there and get a pole and get all the papers we could give him, and work there very hard himself? papers to light the papers down in the water-closet, and work there very hard himself with the poles.

Q. Work at what?

A. At the sewer with the poles.

Q. Will you describe his general appearance—how he looked at this time?

A. He looked frightful to me; he frightened me many times—all my children and every one else in the house. A couple of hours afterward he came in as good-natured again.

Q. Did you ever hear him say anything in relation to his brother James and his family?

A. I did.

Q. What was that?

A. He told me that he had made his will, but he would not leave his relations anything.

(Objected to. Objection overruled.)

Q. Do you recollect anything else happening about that time?
A. He came in shortly and wanted me to buy my child a pair of new shoes, and he would put new soles on them.
Q. They were new shoes then?
A. On to new shoes.
Q. Do you remember his taking your child off one time?
A. Yes, sir; he took her to the Academy of Art—the child was about eight years old—and left her there about a couple of hours all alone.
Q. Do you recollect anything else?
A. On the sidewalk he went on his knee, and a man drove up with a chaldron of coke and put it on the sidewalk, and he went on his
36 knees, finding whether the pavement broke. He run in screaming and told me to move. That was after I paid my rent, on the first of February.
Q. There is a photograph gallery next to you?
A. Yes, sir.
Q. Did he say anything about allowing persons to stand on the sidewalk?
A. Yes, sir; he wanted me to find some fault with it, and he would go and get a dispossession against the people next door.
Q. For what reason?
A. Because they stood on his stoop and were wearing off his stoop.
Q. The people looking at the pictures?
A. Yes, sir; he felt quite angry because I would not say yes.
Q. From those facts, what did you conclude in relation to him?
(Objected to and waived.)
Q. From those facts and the language which you have described, was he, in your opinion, in his right mind or not?
(Objected to; objection overruled; exception taken.)
A. We never took him to be right, or he would not have acted in the way he did towards us.
Question repeated.
A. I always thought he was not in his right mind, from the way he acted.

Cross-examination by Mr. Ritterband:

Q. At the time you speak of his having mentioned to you in reference to the thieves—he thought they were thieves and fired at them, and found they were cats. I suppose you do not know of your own knowledge whether they were thieves or not?
37 A. No, sir.
Q. They may have been thieves, and he may have fired at them?
A. He told me that they were not thieves—that it was a cat.
Q. He told you he was mistaken?
A. He thought for a long time they were thieves, and when he fired he found it was only a cat.
Q. That he found out after he fired?
A. After he fired.
Q. This story that he told you about the Cooper Institute—that was a dream he was telling that he had?
A. No, sir; he said he woke up and a gentleman clapped him on the shoulder, with long white hair, and then he stated the case; he did not know where he was; he seen a grave right before him.
Q. Where did this statement to you take place?
A. In my store.
Q. When was it?

A. This must have been about seven years ago; shortly before he moved up town—when he lived in Pitt street.

Q. Was not it eight years ago?

A. No, sir; it could not be.

Q. How do you know?

A. Because it was shortly before he moved up town.

Q. You say you are certain it was not eight years ago?

A. I am sure it could not be eight years ago.

Q. Why?

A. Because he lived in Pitt street, and he has lived up town now going on six years, and he did not live very long in Pitt street.

Q. Do you know when he went to live in Pitt street?

A. Yes, sir.

Q. What year?

A. He gave up his business and went to live in Pitt street; he lived in Division street.

Q. When did he go to live in Pitt street?

38 A. I could not tell the date.

Q. Was not he living there in 1864?

A. That was the time he was sick.

Q. Was he not living in Pitt street in 1864?

A. He was.

Q. How long before that was it that he went to live in Pitt street; was it a year before 1864 or two years?

A. I could not say exactly; it could not have been more than a year before.

Q. It was about a year before?

A. Yes, sir.

Q. And this was about the time he told you this dream?

A. Yes, sir.

Q. Now this story with reference to the cat—this was a story he was telling to amuse your children?

A. No, sir; he was telling it to me, and he told the story repeatedly to the children.

A. What did he say about the cat?

A. When he kept a shoe-store in Division street——

Q. What did he say?

A. Had a cat there, and the cat used to understand him when he would talk to it; climb up a pole, and when he got on top of the pole he tried to talk to him, the same as a child would.

Q. You have heard of persons teaching cats to climb poles?

A. No, sir; I have not.

Q. You thought is was something very startling?

A. I did.

Q. That was one reason why you supposed he was not in his right mind?

A. Yes, sir.

Q. This working with a pole at the water-closet—where was the water-closet?

A. In the house I live in

Q. Whereabouts in the house?

A. In the yard.

39 Q. Was it a water-closet used by all the persons in the house?

A. Yes, sir.

Q. Did it become stopped up sometimes?

A. We did not find it so. He said he was trying to let the sewer run off, and he worked until he worked himself sick.

Q. Was it dry or wet weather?

A. Dry weather.

Q. What time of the year?

A. It happened a great many times; when he took a notion.

Q. He examined the water-closet, found it stopped up, and worked with a pole?

A. No, sir.

Q. Was it ever stopped up?

A. He said it was, but we never found it so.

Q. You never examined it?

A. We were wondering what he was working at; it was not overflowed.

Q. Do you mean to say it could not be stopped up without being entirely flowed over?

A. I don't know.

Q. You have seen the water-closet frequently?

A. Yes, sir.

Q. Did it connect with the sewer?

A. Yes, sir; but shortly after it was cleaned out, he done that—he made a practice of it.

Q. So as to keep it clean and connect it with the sewer—that was your impression at the time?

A. I suppose so.

Q. On this occasion, when he had these new soles put on your child's shoes, which child was it?

A. My oldest child.

Q. The little girl?

A. Yes, sir.

Q. That was the little girl he was quite fond of at times?

A. Yes, sir.

40 Q. When was this?

A. About six weeks before his death.

Q. Did not you understand the counsel was confining your attention to what occurred six or seven years ago, when you answered it?

A. I answer the question I know*ed* before.

Q. How long before his death was it that you paid this particular attention to the water-closet you have spoken of?

A. This happened last summer.

Q. About how long before his death was it that he told your children about the cat?

A. This happened a long time ago, when he was living in Pitt street.

Q. Two years ago?

A. More than that—it must have been seven years ago, when he lived in Pitt street.

Q. What makes you think it occurred at that time?

A. He came into my place there.

Q. You have lived there thirteen years?

A. Yes, sir.

Q. What makes you think it occurred exactly seven years ago?

A. Because I know the time he moved up town.

Q. Did he move up town in 1864 or 1865?

A. He moved in July.

Q. Do you know it was in 1865 that he moved up town?

A. It must have been.

Q. This occurred with reference to putting the new soles on the child's feet—occurred six weeks before his death?
Q. Yes, sir.
Q. When did he die, do you know?
A. He died, I believe, the first of February; he met my little girl in the car.
Q. Do you know when he died?
A. Yes, sir.
Q. When?
41 A. The first of February—at night, the first of February.
Q. How long have you lived in New York City?
A. I have lived here, I believe, since 1849.
Q. Where did you live before you lived in New York City.
A. In Poland.
Q. You say he took the child to the Academy of Fine Arts?
A. Yes, sir.
Q. With your permission?
A. Yes, sir.
Q. How long ago was that?
A. That happened since he lived up town.
Q. Since 1865?
A. Yes, sir.
Q. This breaking of the sidewalk—how long before his death did that occur?
A. Three years ago, exactly, now.
Q. How long before his death was it that he came into your place and asked you to leave after you had paid the rent?
A. That was three years ago.
Q. How long before his death was it that he mentioned this fact in regard to the photograph gallery?
A. This was here a little before the holidays.
Q. It was about three or four months before his death?
A. Yes, sir; about that.
Q. When was it that it occurred to you that he was not right in his mind—how long before his death?
A. We thought so all the time he lived up town.
Q. Since 1865?
A. Yes, sir; he acted very queer; he used to bring us in boxes of pills.

Re-direct:

Q. Did you think he was in his right mind when he told you about the ghost story?
42 A. No, sir; I did not.
Q. When was that?
A. That was before he moved up town.
Q. What year was that, about?
A. That must have been about seven years ago.
Q. Did you think he was in his right mind when he told you about the cat story?
A. No, sir. I thought it was very queer, his telling me such a story about a cat.
Q. Then those were the only two circumstances you recollect now that took place six or seven years ago?
A. Yes, sir.
Q. These others took place since 1864?

A. Yes, sir; since he moved up town.
Q. Do you know when he moved up town?
A. He moved somewhere, I don't really remember what year. I know he has lived up there quite a while with me.
Q. Do you know how many years? Can you get at it in that way?
A. I remember my mother has been dead five years last September, and he moved somewheres along in July. I don't think it is quite five years since he moved up town.

ELIZA JANE ALPHONSE, called for contestants, sworn.

Direct examination by Mr. Flynn:

Q. Where do you reside?
A. No. 273 Delancey street, New York.
Q. Did you know Charles Fox in his life-time?
A. I did.
Q. Was he a relative of yours?
A. He was.
Q. How near relation was he to you?
A. He was a cousin.
Q. How long have you been acquainted with him?
A. Thirty-odd years.
43 Q. Did you live in the same house with him?
A. At times I did; different times, not always.
Q. Can you state any facts in relation to any peculiarities he had?
A. Well, yes, sir; I can.
Q. Will you state anything you know in relation to him?
A. Well, he boarded with us at one time.
Q. When was that?
A. That was twenty-five y'ars ago.
Q. You need not go back as far as twenty-five years ago. Confine yourself to matters that happened ten years ago, or up to 1864?
A. Well, at that time he used to visit us, ten years ago. He would come in and would sit down a few minutes. He would pull off his coat. He would say a few words, and he would get up again and put it on and go as far as the door, and he would come back again and pull it off and sit down again and say a few words, and then, if he would get on his coat the second time, he would say he was all in a perspiration, and he would have to pull it off again, and he would talk and go off, and perhaps it would be all done in ten minutes.
Q. Go on and relate circumstances in connection with him from that time down.
A. He has always acted that way all through. Before that he boarded with us.
Q. What about when he boarded with you?
A. He would come down to his meals, and things that were gotten, he would ask where they were bought, and sometimes he would say he would not eat it from such a place, and he would want it put one side and go out and buy others, and it was pretended to him that we did, and he would eat the same and say it was much nicer than what came from the other place, and perhaps it would be just the same.
Q. Do you recollect anything about a turkey sent there by his brother James as a present?
A. I do. They took him up a plate of turkey.
44 Q. When was that?
A. That was eight years ago, and he put it one side; he would

not eat it; and in about three days after it was brought up to him he came home one night, he said pretty hungry, and he ate a piece of the turkey, and he left the other remaining on the plate.

Q. Did he make any statement in relation to that turkey?

A. He said he did not want to eat it; he did not know what it might do to him. He kept one piece remaining on the plate, if he was taken sick.

Q. Did he say he was afraid it would poison him?

A. Yes, sir.

Q. Do you recollect anything else?

A. I don't know as I do.

Q. You told me forty things.

A. But it is so far back.

Q. Confine yourself to five or six years. What was his general appearance at these times? How did he look?

A. Well, he looked kind o' wild at the last. We did say amongst ourselves that we believed that he was——

(Objected to.)

Q. What conclusion did you form yourself from these facts and conversations?

(Taken subject to the same objection.)

A. That he was an insane man; that he did not have his right mind.

Cross-examination by Mr. Cooney:

Q. At what time of the year was it that you spoke of his coming in and taking off his coat?

A. I said that it was seven years ago.

Q. At what time in the year—what month?

45 A. I did not tell what month it was in.

Q. Did you see him often do it?

A. I said I seen him about once a year.

Q. How often did he come in your house?

A. He used to come in very often.

Q. How often did you see him take off his coat?

A. Several times.

Q. Do you know what time of year it was?

A. I could not tell.

Q. Do you know whether warm or cold weather?

A. It was in cold weather.

Q. You said he was in perspiration?

A. If he sat with the coat on.

Q. Was that an overcoat you speak of?

A. Yes, sir.

Q. Did he ever state before you any objection he had to buying from some stores and not from others—grocers?

A. Yes, sir.

Q. What reason did he give for liking one better than others?

A. Well, he did not like the people.

Q. Did not think they were so nice?

A. He was afraid they would poison him.

Q. Was he on friendly terms with his brother that sent him the turkey?

A. At that time they were on friendly terms.

Q. For how many years had they not spoken?

A. I don't know as there was any time then. I did not say anything about his not speaking to the brother.

Q. You say they were not on friendly terms?
A. I did not say so then, at that time.
Q. Is such the case? Were they or were they not?
A. They were on friendly terms at that time.
Q. Do you know of any time that they were not on friendly terms?
A. Yes, sir; there was a time that they were not friendly.
46 Q. Was not he afraid of all his relations?
A. Yes, sir: sometimes he was.
Q. Why did you think he was insane?
A. Well, he acted that way.
Q. How did he act? Give us some idea.
A. Well, by flying in and putting on his coat; taking it off and putting it on; that was one thing; and other times if I had a friend come in when he sat there—if he just came in, he would jump up and go out, if he had not been in the house a minute.
Q. For that reason you thought him insane?
A. I did.

Re-direct:

Q. You know other reasons, do you not?
A. Yes, sir; I know other reasons.
Q. Give them to us.
A. I have answered all that you have asked me.
Q. (By the surrogate.) You have given the facts and circumstances?
A. I have told you all at that time; perhaps I could sit and tell other things.
(Counsel for contestants reserves right to recall Mrs. Alphonse.)

MARY FOX, called for contestants, sworn.

Direct examination by Mr. Flynn:

Q. Where do you reside?
A. No. 36 Ryerson street, Brooklyn.
Q. Did you know Charles Fox in his life-time?
A. Yes, sir; I did.
Q. What relation were you, if any, to Charles Fox?
A. I married his brother James.
Q. You are the mother of these children that are contesting this will?
A. Yes, sir; I am.
47 Q. When were you married—how long ago?
A. It will be eleven years, the 24th of July next.
Q. Do you know any facts connected with Mr. Fox, about five and a half or six years ago, or previous?
A. Yes, sir, I do.
Q. What are they?
A. It was along in the holiday time, one of the neighbors baked a mince-pie.
Q. Holiday time, when?
A. About six years ago, I think; baked a mince-pie and gave it to him, and he took it up in his room, and kept it two or three days; he then brought it down into the basement where I was; he said, "Mary, I want you to throw this mince-pie away; I am afraid to eat it, I am afraid it is poisoned." I washed the plate and gave it to him.
Q. Anything else?
A. He was boarding at a place where I was, and one morning he brought in a loaf of bread, three eggs, and two onions; he wanted one egg cooked for his breakfast, and ordered some bread cut off for his

breakfast, and told the landlady to keep the other for him; this made the landlady angry and he left.

Q. Anything else?

A. He moved in the house in Pitt street, and moved in the room where his mother lived—in the rooms where his mother lived and died; he did not know what was the reason, but he could not sleep in the room that his mother died in, he said; he drew out his bed a number of times into the other room; then he would draw it back again; I would hear him several times through the night doing so—in the night-time; he told me then the next day he did not know what was the reason he could not sleep in that room.

Q. Do you know whether or not he objected to the food prepared by his mother for him?

A. Yes, sir.

Q. What reason did he give for that?

48 A. Because he thought it was poisoned.

Q. Do you know whether or not he objected to the turkey sent by your family to him?

A. I remember preparing the turkey on to a plate; yes, sir, I know the fact; I know when I done so.

Q. (By Mr. Cooney.) Do you know the fact of his objecting to it—whether he objected to it or not—except through hearsay?

A. No.

Q. Do you know whether he objected to his mother washing his clothing?

A. No; I don't remember.

Q. Do you know any other facts in relation to him, happening about that time?

A. I know he never went out of doors, left his house, without going about half a block and returning back again into his house; he always acted very singular in that respect.

Q. Will you state his general appearance, about his actions, his appearance; about the eyes, particularly.

A. His general appearance to me was a man that I would not think was in his right mind.

(Objected to.)

Q. I mean how he appeared to you, how he acted?

A. He appeared to me always like an absent man; a man that had an absent mind, as though he did not know his mind; that is the way he appeared to me, and I always felt that he did not.

Q. What peculiar expression, if any, was there about his eyes?

A. A wild look to me always; I never looked at him unless he looked wild.

Q. Do you know the fact whether he had an aversion to his relatives?

A. He did not like them.

Q. He did not like any of them?

49 A. No, sir; I don't think he liked them.

Q. And thus, from this conversation which you had with him, and the acts which you have seen him perform, did you believe him to be a rational man?

(Same objection.)

A. I believe that he did not have his right mind.

Cross-examination by Mr. Cooney:

Q. How long has your husband been dead?

A. He has been dead about nine months; he died the sixth of May last.

Q. Your husband's name was James?
A. Yes, sir.
Q. Was he on friendly terms with his brother Charles?
A. Yes, sir; he used to go up there; he went up there, I cannot say just when, but awhile before he died—I think the summer before he died—and took the children up there, and they were on friendly terms. I think he wanted to see him; he always felt that James wanted to see him.
Q. You stated he never left the house without turning back; did he seem to be afraid of anything or anybody?
A. I think he was.
Q. Do you remember the fact of his receiving a very severe beating on the street, of his being attacked and very badly beaten?
A. No, sir; I don't remember.
Q. Have you not heard that such was the case?
A. I might have heard it, and it slipped my memory.
Q. Have you never heard that parties made threats against him, residing in the neighborhood?
A. No; I don't remember.
Q. When was it, in what year, that this pie was sent to him?
50 As near as I can come at it, it was about eight years ago.
Q. Where was he living then?
A. He was living in Pitt street, I think; I think it was about that time.
Q. Do you know, of your own knowledge, that he ever objected to any food prepared by his mother?
A. Yes, sir.
Q. Were you present when he objected?
A. No; I heard it from my husband, his brother.

WILLIAM P. FERGUSON, called for contestants, sworn.

Direct examination by Mr. Flynn:

Q. Did you know Charles Fox in his life-time?
A. I did.
Q. How long did you know him?
A. Well, I have known him for a good many years.
Q. About how many years?
A. Well, say thirty years.
Q. Were you any relation to him?
A. Yes, sir.
Q. What relation?
A. Cousin.
Q. Can you give us any of his peculiarities?
A. Do you want me to go as far as when he commenced his shoe business?
Q. Yes.
A. Well, sir, I was the first boy he had when he sot at the shoe business; I was a little boy.
Q. How long ago was that?
A. Well, I was about fourteen years old, I think.
Q. How long ago was it?
A. I could not exactly say.
Q. Twenty or thirty years?
A. About thirty years, I think.
Q. You have known him all along since that?

51 A. Yes, sir; you see I have been out of the place considerable. I have been in his company different times; he has been to my house, called in; I boarded there a year in Brooklyn, with my mother, and he always used to come there every Sunday, to see my mother.

Q. Give the facts.

A. He would call in and sit down and would get up and take his coat off and put it on the back of a chair—get up and put it on again, and when he would go, you would think there was something said that he did not like; I always thought a good deal of Charles; he acted to me just as his brother did; I served my time with his brother.

Q. Do you know whether insanity was hereditary in the family?

(Objected to; objection sustained; exception taken.)

Q. Do you know what his father died of?

A. I was not acquainted with his father.

Q. What did his brother Joe die of?

(Objected to; objection sustained.)

Q. Do you know any other facts in connection with him?

A. Well, I know that my mother has cooked for him; he boarded with my mother, and she cooked to her best knowledge what she thought he would relish; she went out and got chicken, I recollect, one time, and cut the leg off and broiled it for him, and sat it down, and he came down to the table and took it and gave it a flirt one side.

Q. Why?

A. It appears it was not right for him.

Q. What do you mean by that?

A. Because he put it away, you know—put it one side.

Q. Did he state what his objections were to it?

52 A. He never spoke.

Q. (By Mr. Cooney.) You do not know whether it was well-done, or raw, or not?

A. Yes, sir; I do.

Q. How long ago were these facts you have detailed?

A. It was a good many years ago; over thirty years ago; about that time.

Q. Do you know of any facts in the last ten years in relation to him?

A. What I said about his coming to my mother's; I was here at that time.

Q. You have seen him a number of times since?

A. Of course.

Q. How did he look?

A. He looked to me wild.

Q. What was the appearance of his eyes?

A. It was a wild look.

Q. You have conversed a good deal with him, have not you?

A. Yes, sir.

Q. And seen him act a good deal?

A. Yes, sir.

Q. What conclusion did you draw from his acts and your conversations with him that you have stated, as to his being rational or irrational?

(Objected to; objection overruled; exception taken.)

A. Well, sir, I don't think he was in his right mind, not by the way he acted.

Cross-examination by Mr. Cooney:

Q. How long was he in this boot and shoe business?

A. Well, I could not tell, for I left the city.

Q. How long were you with him?

53 A. Well, probably I was there a year; it is so long ago I can hardly recollect.

Q. Did he do a large business?

A. Well, middling; he had custom-work.

Q. Was he successful in that business?

A. Yes, sir.

Q. He had the reputation of being a good merchant?

A. Well, yes, sir; but it was not on a very large scale.

Q. As to this time, about cutting off the leg of chicken and broiling it, it occurred about thirty years ago?

A. I should think it was about in that neighborhood.

Adjourned until Tuesday, March 15th, at 11 o'clock a. m.

NEW YORK, *Saturday, March 19th*, 1870.

CHARLES RODH, called for contestants, sworn.

Direct examination by Mr. Vanderpoel:

Q. Where do you reside?

A. I reside at 163 East Thirty-third street, in this city.

Q. Are you a practicing physician and surgeon?

A. Yes, sir.

Q. How long have you been such?

A. Ten years.

Q. Since you were admitted to practice have you resided all the while in this city?

A. Yes, sir; since that time.

Q. Did you know Charles Fox in his life-time?

A. Yes, sir.

54 Q. Have you made diseases of the mind as well as of the body a study?

A. Yes, sir.

Q. When did you become acquainted with Charles Fox?

A. In 1864.

Q. Did you have occasion, at or about that time, to examine him professionally?

A. Yes, sir.

Q. Where did you go to see him?

A. He came often to my room.

Q. Was your office near his residence?

A. Yes, sir; I lived in one of his houses in Third-avenue, near Thirty-seventh street.

Q. About how long did you live in one of his house?

A. About thirteen months; it was over a year. I don't remember exactly; it may be fifteen months. I don't recollect.

Q. But after you removed from his house, were you in the habit of seeing him?

A. Yes, sir.

Q. Where—at your own office?

A. No, sir; I met him sometimes in the street or in the cars.

Q. Did you visit him at all?

A. No, sir.

Q. About what time in 1864 did you become acquainted with him?

A. I can't tell it exactly.

Q. In reference to the month of May of that year?

A. I guess before that time; yes, sir.

Q. Did he make any complaints to you, at or about that time, as to his health?

A. Not at that time.

Q. When was your attention first called to his physical health?

A. During that time, when I lived there in his house; that was 1865; about a year after that.

Q. Where were you living at the time you became acquainted with him?

55 A. I lived in Third avenue, between Thirtieth and Thirty-first streets.

Q. Near his place?

A. Near his place. I was in his neighborhood almost every day.

Q. The question of Mr. Fox's mental condition is under investigation here, and I wish you would go on, in the first place, and state in your own way whether you noticed anything peculiar about him mentally; and, if so, what, from the time your acquaintance began with him?

A. He had always something particular in his appearance—something that was abnormal; in his speech, when he talked, he was very quick, and very much excited easily without any particular cause.

Q. He became very much excited easily without any apparent cause?

A. Yes, sir.

Q. Go on and state what else you saw of him.

A. I had not much conversation with him at that time; but in 1865 I made more observations of his mind, and found out that the cause of his actions were more based on a disease of the brain, or, if not on the brain, on lesion of the bone.

Q. Do you mean the cranium bone?

A. The cranium bone, or the membrane of the bone or of the brain; in 1865 I saw him very often. I observed him more. He talked sometimes about his circumstances with me. He complained sometimes about dizziness in the head. He complained sometimes that he got excited in a very easy way. He complained about costiveness, but he did not want me to prescribe for him; he always said he was his own physician; he showed fear for any physician.

Q. In what way did he show it; what did he say?

A. I don't recollect exactly, but the impression was that he thought a physician would poison him. I talked about it, his manner of living; he said he got his meat every day himself, and his potatoes, and then he was quite sure what he got for dinner.

56 Q. Did he speak of his relatives?

A. He talked about them; I asked him if he had any relative, and he was opposed to all his friends and to his relatives; I guess he did not have one friend as far as I recollect; he was in fear.

Q. As the result of your examination, did you form any opinion as to whether he was sane or insane?

A. I formed, sir, the opinion that the freedom of his will or mind was prevented by that disease of the brain.

Q. To what extent was it prevented—it is hardly answering my question; did you conclude whether he was sane or insane?

A. He had delusion in that way, that he had fear.

Q. Did he refer to having any enemies at any time?

A. No, I don't remember that.

Q. State to the court fully the conclusion which you formed at that time as to the mental condition of this man Charles Fox.

A. The condition of that man was not in a normal state; that is my impression.

Q. Did you regard him as insane?
A. Yes, sir.
Q. You say you examined him carefully in the year 1865—I don't understand whether you made any special examination of him in 1864?
A. No, sir.
Q. I want to know whether, when you examined him in 1865, you had your attention called to the fact that the traits he then exhibited had also exhibited themselves in 1864?
A. Yes, sir; his behavior was about the same as that time; if he came to a place he took off his coat and then put it on again; he took off his overshoes, in the same minute he put *it* on again, and all his behavior was the same in 1865 as it was in 1864.
Q. I infer from your statement that he was a restless, uneasy man?
57 A. Yes, sir; he complained about that, and he took always pills of his own making, he said; I don't know what *it* contained; he kept a secret about the pills. He had no confidence in me about the pills.
Q. Did you notice anything about his eyes, any peculiarity at any time?
Q. Yes, sir; the pupil of the eye was contracted, but it might be the result of headache, in congestion of the brain that he had at that time, but it proved to me that he had congestion of the brain.
Q. Did you ever hear him speak of his brother or of his brother's family?
A. Yes, sir; I remember he talked about it, but I don't recollect exactly what it was he talked about it; I know that he talked about a brother, but I don't recollect any particular now about it.

Cross-examination by Mr. Cooney:
Q. You were not born in this country, were you?
A. No, sir.
Q. Where were you born?
A. I was born in Germany.
Q. How long have you been in this country?
A. I am here ten years.
Q. Just ten years?
A. Just ten years.
Q. When were you admitted to practice as a physician?
A. I have been practicing this ten years.
Q. In what year were you admitted?
A. In 1860.
Q. From what institute did you graduate?
A. I graduated in Giessen, in Germany, in 1853, and here in 1866, in the college in Twenty-third street.
Q. Between 1860 and 1866, were you practicing without a diploma in this country?
A. Yes, sir; I had a diploma.
Q. Had you a diploma to practice here between 1860 and 1866?
A. Yes, sir.
58 Q. You say you graduated here in 1866?
A. But I graduated in Germany in 1853.
Q. Did you have a diploma to practice here, from 1860 to 1866?
A. No; I did not want a diploma.
Q. Have you ever been connected with a hospital or college in a professional way?

A. Yes, sir.
Q. As what and where?
A. In Bellevue Hospital and in the Broadway Hospital.
Q. What year in Bellevue?
A. In 1862 and 1863.
Q. 1862 and 1863 in Bellevue?
A. Yes, sir.
Q. What was your position?
A. I was not a physician there; I attended sometimes a lecture there.
Q. You were not connected professionally with the hospital?
A. No; I had no situation there.
Q. Were you ever connected professionally with any hospital or institution of medicine of any kind in this country?
A. No, sir.
Q. Or in Germany?
A. No, sir.
Q. When did you first become acquainted with Mr. Fox?
A. In 1864.
Q. Where was he living at that time?
A. I don't know; I did not see him in his house; I saw him in the neighborhood there always when I passed by, or in stores.
Q. Do you remember that you merely saw him on the street or in a store?
A. In different ways.
Q. How did you become acquainted with him and when?
A. I saw him the first time—there was a woman fell in the street there, and——
59 Q. When was that?
A. That was about 1864.
Q. Why do you fix upon 1864; did you make any memorandum of the year?
A. I know that it was about a year before I removed to him. I saw him since that time oftener.
Q. How do you know that that was a year before you removed to him?
A. As far as I could recollect; it may be a month over a year or a month less; I don't recollect.
Q. What month was that—what time in the year?
A. I cannot say exactly the month.
Q. Don't you know what time of year it was?
A. It was in 1864.
Q. What time during the year?
A. It was early in 1864.
Q. How early—what month, about?
A. I can't say that exactly.
Q. Do you know that it was in the spring, summer, or fall?
A. It was in the spring, I know that; I knew him over a year before I removed there; I don't know exactly.
Q. How do you know it was in the spring when you saw him at that time; tell us about what month, if you remember, it was in the year—can you fix the month?
A. It is very hard to fix the month; it is much easier to fix the year; I know it was over a year that I knew him before I moved there.
Q. Was it warm weather?
A. Well, sir, I cannot say that.
Q. Well, how do you arrive at that being spring?
A. I know that I knew him about a year, or a little more than a year.

Q. That is the reason you fix it as being in the spring that you first saw him?
A. Yes, sir.
Q. What occurred at that time when you saw him?
60 A. A woman was fallen in the street, and she was brought on the sidewalk. He assisted her, and another person was standing near, and said, "There is a physician;" and by that I had a conversation with him.
Q. Had you ever seen him previous to that?
A. Yes, sir; I saw him very often.
Q. But not to speak to him, though?
Q. No; that was the first time I talked with him.
Q. When were you first called on to attend him?
A. I did not attend him.
Q. Were you ever called to attend him?
A. No, sir; he came to my office, and he talked about his circumstances only.
Q. He never called on you professionally as a physician?
A. No, sir; I never got any fee from him, but he complained to me.
Q. Where was this office; in one of his houses?
A. Yes, sir.
Q. Was he in the habit of calling there to collect his rents?
A. Yes, sir.
Q. Looking after his business?
A. Yes, sir.
Q. It was at these times that you met him?
A. Oh, he came very often.
Q. When he came there to look after his property and rents?
A. Yes, sir.
Q. Did you hire your place from him?
A. Yes, sir.
Q. What kind of a business man was he?
A. Oh, he was a good business man.
Q. You always found him very sound about such things?
A. Oh, yes.
Q. He had a good idea of matters and things that were going on around him; did not he?
A. Yes, sir.
61 Q. He was a thinking, reasoning man; was he not?
A. Partly; yes, sir.
Q. What do you mean by "partly?" What was he not in?
A. Sometimes he was strange.
Q. What was he strange in?
A. In his behavior.
Q. You say you have made diseases of the brain a study. Where?
A. In Germany.
Q. In your regular course of practice?
A. In my regular course of practice.
Q. Have you ever had the care or treatment of insane persons?
A. From time to time; not regularly.
Q. Have you ever made that a special study?
A. No.
Q. You never have?
A. No, sir.
Q. Are you familiar with the symptoms of insanity practically?
A. Yes, sir.

Q. Thoroughly familiar?
A. I think so.
Q. So that you could not make any mistake?
A. I think so.
Q. Do you know whether or not this man was not dyspeptic?
A. Dyspepsia is sometimes a consequence of insanity.
Q. Was not this man a dyspeptic also?
A. I don't know it.
Q. If such had been the case, don't you think that many of the symptoms that this man had would have been caused by that dyspepsia?
A. He was costive. You may call it dyspepsia.
Q. Is not that one of the symptoms of dyspepsia?
A. Dyspepsia itself is only a symptom.
Q. You say he was nervous, excitable, and apprehensive?
62 A. Yes, sir.
Q. Are not those symptoms of dyspepsia?
A. It may.
Q. Answer me positive; it is so, is it not?
A. Yes, sir.
Q. Don't you think that unless a physician made a very careful examination, that he might make a mistake between the symptoms of dyspepsia and insanity?
A. It requires a long observation to find out the difference between it and dyspepsia.
Q. Many of the symptoms are precisely the same, are they not?
A. Yes, sir.
Q. Have you ever met many eccentric people?
A. Yes, sir.
Q. A great many?
A. Yes, sir.
Q. Do you consider that all eccentric people are insane?
A. No.
Q. Don't you think a man can be very queer without being at all insane—very odd?
A. Patients can be eccentric in one way.
Q. How many times before 1865 did you ever see this man to talk with him on anything else than business?
A. I cannot recollect it exactly; but I saw him several times; it may be seven times or eight times, or more; I don't know exactly.
Q. You say in 1865 that he complained of dizziness, excitement, and costiveness?
A. Sleeplessness, restlessness.
Q. Would not the fact of a man's being costive produce dizziness?
A. Yes, sir.
Q. Would not it also make him excitable; it would be very apt to make him nervous—derange his system?
A. Not in that way.
Q. It would not derange the system to be costive?
63 A. No, it would not excite him; it would not make him so nervous and so restless and so dizzy—sleepless.
Q. But it would not excite him?
A. It would not excite him.
Q. Did you ever see anybody but Mr. Fox take off his coat and put it on again, or his overshoes?
A. They may once in a while.

Q. You have seen other parties do it?
A. Yes, sir.
Q. Did you think they were insane when they did it?
A. No, sir; of course.
Q. Do you think that a party who makes his own pills, or takes a medicine of his own, shows any symptoms of insanity by so doing?
A. It depends on the reason why he made his pills.
Q. No matter what reasons—do you think it would?
A. No.
Q. Not at all?
A. No.
Q. Do you think it an evidence of insanity for a man to be afraid of having a physician, to be distrustful of them?
A. No.
Q. How did you ascertain about this disease of the brain; when did you make this examination; you say you were never called in by this man?
A. Yes, sir.
Q. He never employed you?
A. No; but he complained; he talked about his disease with me.
Q. How was this examination made?
A. He complained; I took up all his symptoms; I inquired about the course.
Q. What course; what do you mean?
A. How it was in connection with his bowels; his dyspeptic conditions, and so; he said he got a stroke or fall on his head some years ago, and since that time he had that excited condition—that fearful condition.
64 Is the contraction of the pupil of the eye a symptom of anything else than congestion of the brain?
A. Yes, sir.
Q. What other disease or cause would contract the pupil of the eye?
A. Any inflammatory condition of the brain or membrane, or any irritation to the brain.
Q. Would not anything else?
A. Irritation? No.
Q. Is there any other disease that would have that effect?
A. No; or if you would apply medicine to his eye direct, that would bring it on; perhaps opium.
Q. Is there any disease of the eye that would produce that?
A. Oh, yes; inflammatory disease.
Q. Any inflammatory disease would produce it?
A. Yes, sir; not every.
Q. How much practice have you had among insane people? How many patients have you ever had that were insane?
A. That is very hard to count that.
Q. How many have you had?
A. I cannot say that.
Q. About how many?
A. That is very hard; I did not have a great many.
A. About how many? Have you had a hundred? Have you ever treated a hundred insane people?
A. I don't think so.
Q. Have you ever treated ten?
A. I may have; more than this.
Q. I want to know, positively, how many have you treated.

A. It is very hard to say.
Q. Have you ever treated ten people who were insane?
A. Oh, more than this; twenty-five, I think.
Q. Where did you treat those parties?
A. I saw a great many when I studied in Germany. I saw a great many here.
65 Q. How many in Germany, when you were studying, did you treat there?
A. I did not treat there myself, but I saw them at clinique; the hospital.
Q. I ask you how many you yourself have treated. Have you yourself ever treated and had under your control and treatment five persons for insanity?
A. No; I guess not.
Q. Have you ever heard the remark made of eccentric people that they were insane?
(Objected to as irrelevant; question waived.)

Redirect:

Q. Is dyspepsia sometimes connected with, or does it proceed sometimes from, insanity, from an unsound condition of the brain?
A. Yes, sir; it is in coincidence. It is at the same time.

Recross:

Q. When you were at Bellevue Hospital, under what professors did you study there?
A. I attended the lectures of the professor, Dr. Clark.
Q. Who else?
A. Dr. Thomas.
Q. Were you in the class there regularly?
A. Yes, sir.

MARY MUNSEN, called for contestants, sworn.

Direct examination by Mr. Vanderpoel:

Q. Did you know Charles Fox in his life-time?
A. Yes, sir; I knew him when I was a little girl, but I had not seen him of late years until about 1866.
Q. Where did you see him then?
66 A. I lived in his house.
Q. Where was he then living?
A. In the same house.
Q. In Third avenue?
A. Yes, sir.
Q. What family did he have at that time?
A. None but himself; he lived all alone.
Q. Did he cook for himself?
A. Yes, sir.
Q. Who did his washing?
A. I guess he did it partially himself; he did wash some himself, I know; with the exception of his shirts—he gave them out.
Q. His underclothing?
A. He washed himself, I know.
Q. Did he give any reason for that that you heard?
A. No, sir.
Q. Who took care of his room?
A. Sometimes he would hire a woman, once a month or so.

Q. At other times?

A. He would take care of it himself; there was not much care taken of it.

Q. You knew him, you said, in early life?

A. I knew him when I was a little girl; he knew my parents.

Q. Of what country was he a native?

A. New York.

Q. Did you know his brother—his brother James?

A. I did not know so much of him; I was acquainted with his wife's family.

Q. You knew he had a brother James?

A. I knew he had a brother James.

Q. Did you ever hear him speak of his brother James after you became acquainted with him again, or renewed your acquaintance in 1866?

A. No, sir; not much; I have heard him speak——

Q. What have you heard him say?

A. He did not care much about him—he did not know much
67 about him, for he had not seen him; he did not go to see him very often; he cared very little for his family, he said.

Q. Did you ever hear him say anything as to what he was going to do with his property, in connection with his brother James?

(Objected to; objection overruled.)

A. I asked him the question once in regard to what he was so saving for—he had nobody to leave it to—his family—and they would not care much about it; he said they would not get anything he had.

Q. Did he give any reason?

A. No, sir; he was very parsimonious, and I asked him the question.

JOHN N. CLARK, called for contestants, sworn.

Direct examination by Mr. Vanderpoel:

Q. Did you know Charles Fox in his life-time?

A. I did, sir.

Q. Where did he live when you first knew him?

A. In Division street.

Q. About what year was that?

A. In 1854, as near as my memory serves me.

Q. Did you see much of him after that time?

A. Considerable, for a number of years—mostly daily.

Q. About how many years—down to the time of his death?

A. I kind o' lost sight of him for a while; I moved from the neighborhood; I formerly lived next door to him.

Q. In 1854 you lived next door to him?

A. From 1854 to 1860, six years, I lived next door, I think.

Q. State to the court what his conduct was during the time that you lived next door to him?

68 A. Well, I considered him a bad neighbor.

Q. In what way did it develop itself?

A. Well, in interfering in my arrangements next door; he would come in and say a good deal, and I told him that I did not wish him around the house—did not want him in the house.

Q. What was his disposition?

A. Well, to find fault.

Q. Would he find fault when there was a cause or without cause?

A. Without cause.

Q. What else did you notice about him?

A. I thought he was very eccentric—in fact, I thought he was crazy; that is the whole amount of it.

Q. Was that from any one isolated circumstance, or from his general conduct?

A. General conduct—general conduct, annoying, petulant, offensive.

Q. After 1860, did you see anything of him?

A. Yes, sir.

Q. Where?

A. I frequently met him in the street.

Q. Did you ever see him in any other places, or in any other way than just meeting him in the street?

A. I never was in his house; I moved away in 1860 from the place; he annoyed me, that I was glad to get out of the way with my family.

Q. In what way did he annoy you?

A. Coming there to find fault with things.

Q. (By the Surrogate.) Cannot you state any instances?

A. He said the water from my hydrant annoyed him; my hydrant was on the line, and he said that it annoyed him, and many things, so that I undertook to keep him off the property altogether; I built a high fence between us, and told him that I had nothing; it was a vacant lot, and I did not want to know him; did not want any trouble with him.

Q. In what way did he say the hydrant annoyed him?

69 A. The water running on his lot.

Q. Did it run on his lot?

A. Not that I know of; I had a drain to my place, and so drained it.

Q. What else did you see about him?

A. Well, I thought he was kind of an odd genius, and I paid very little attention to him; when he came there to annoy me, I told him I did not want anything to do with him; I wanted no annoyance, and I wished him to keep out of my house and not trouble me.

Cross-examination by Mr. Cooney:

Q. What is your business?

A. Builder.

Q. Were you a builder at that time?

A. Yes, sir.

Q. Your opinion was formed of this man from the annoyance he gave you?

A. Yes, sir; and his actions.

Q. From his being a bad neighbor?

A. Yes, sir.

Q. And finding fault and complaining?

A. Yes, sir.

Adjourned until Friday, March 25th, 1870, at 11 o'clock a. m.

NEW YORK, *March 25th*, 1870.

Adjourned until March 26th, 1870, at 12 o'clock m.

70 NEW YORK, *March* 26, 1870.

BENJAMIN M. YOUNG, called for contestants, sworn.

Direct examination by Mr. Flynn:

Q. Where do you reside?

A. No. 590 Water street, now.

Q. What is your business?

A. I am working at ship-caulking now.
Q. Did you know Charles Fox in his life-time?
A. Yes, sir.
Q. How long have you known him?
A. I have knowed him since the summer of 1835.
Q. Did you have any business relations with him at any time?
A. I had no business with him; I served my time in a shop with his brother.
Q. Did you come in contact with Charles many times?
A. Yes, sir; often.
Q. Do you know any facts or circumstances about him which you regard as peculiar?
(Objected to as leading. Objection sustained.)
Q. Did you know anything peculiar in relation to his actions?
(Same objection; objection sustained.)
Q. Do you know anything about him which you characterize as rational or irrational?
(Objected to; objection sustained.)
Q. Go on and tell us all you know about him.
71 A. All I know is, I served my time in a shop where his brother was; and I know once, I believe it was in 1846 or 1847, his brother had to leave his business to go up there and take care of Mr. Fox; that is all I know; he had to leave his business and go up there to take care of his business. He was not fit to take care of his own business.
Q. Did you see Mr. Charles Fox?
A. Yes, sir; I have seen him go out and leave his shop alone. Charles Fox, when he kept in Division street, he would go out and leave it alone, and his brother James had to go there and take care of the shop, and stay with him.
Q. Why did he have to take care of the shop for him?
A. Because he went and left it; because Charles would go and leave it, and he had to go and stay with him.
Q. What else do you know about him?
A. I don't know anything more about him. I have known him ever since. I saw him about, I think it was summer before last, when I was up at the Central Park one day, and had a talk with him—just spoke to him.
Q. Did you see him leave the shop that time?
A. Yes, sir; he came down to the shop where his brother was, and wanted his brother to go with him down town with some business.
Q. How did Charles act?
A. Wild.
Q. What did you conclude from his acts about whether he was in his right mind?
(Objected to; objection overruled; exception taken.)
A. From the way he acted I thought he was out of his mind—I did not know what.

HENRY LAMP, called for contestants, sworn.

Direct examination by Mr. Flynn
Q. Where do you reside?
72 A. Williamsburg, sir.
Q. Did you know Charles Fox in his life-time?
A. Yes, sir; I have slept with him.

Q. When did your acquaintance with him begin?
A. In 1836.
Q. Did it continue up to the time of his death?
A. No, sir; until some four years ago.
Q. You say you have slept with him?
A. I have; yes, sir.
Q. When was that?
A. From May, 1836, to November, 1836.
Q. If you know any facts in relation to him, I wish you would state them.
A. Well, sir, they would not let me answer the question; they would not take my opinion.
Q. I ask for the facts.
A. I have been acquainted with him. I have seen him in all his relations pretty much, and have noticed him, and at times there was something very peculiar about him. He would act at times—I will state an instance where he acted as though there was something wrong in his mind.
Q. Give us the instance.
A. The instance occurred when his brother Joseph was an imbecile and sick in the house, and I was visiting the house, and his brother rose up to strike me, and Joseph came around, or James, the brother, came around, and the three had a kind of idiotic laugh over the circumstance. This sick brother got up to strike me. Joseph was then an imbecile in Mr. Charles Fox's place, in Division street.
Q. Do you know any other circumstance?
A. I have met him since that on the ferry-boat when he has not recognized me.
Q. Do you remember any peculiar remarks that he made to you?
(Objected to. Objection overruled.)
73 Q. What remarks?
A. At times he would act as I told you—he would act peculiar, as though there was a vacancy. At other times he would act different.
Q. (By the Surrogate.) In what way would he act?
A. He would converse on one subject, then change his mind, and get up and have a peculiar laugh about the circumstance when he thought, perhaps, he would have the best argument with you.
Q. What else?
A. That is all.
Q. You don't recollect the specific circumstances—acts? All you know is, that the impression was conveyed to your mind that he acted peculiarly?
A. That would be it naturally. Yes, sir.
Q. Did you form any opinion from his action, in relation to the state of the man's mind, from what you have stated?
(Objected to. Objection overruled. Exception taken.)
A. From my intimacy with him, I think at times he was of unsound mind.
Q. That opinion is not based upon any one isolated fact?
A. No, sir; when I come to consider that certain things, being with him in the house, boarding with him, sleeping with him, and hearing his general conversation.
Q. You consider he was a man of what?
A. At times he was not of sound mind.

Cross-examination by Mr. Cooney:

Q. What is your business?

A. I am a caulker by trade.

Q. How long have you been such?

74 A. Since about 1836.

Q. Have you ever studied medicine?

A. No, sir.

Q. Have you ever made insanity a study?

A. Never.

Q. Have you ever treated any person for insanity?

A. Never.

Q. Are you familiar with the symptoms?

A. Never.

Q. Why did you think this man was of unsound mind?

A. From his general actions.

Q. What were those actions?

A. The actions were imbecile at the time.

Q. What did you base the conviction on?

A. The man was acting foolishly at times, when he got the best of an argument.

Q. Do you think, when he argued with you and got the best of you, and then laughed, that that was an indication of insanity?

A. Not with me; I did not argue with him. I have heard others argue with him.

Q. Have you been subpœnaed here?

A. Yes, sir.

THOMAS F. RANDALL, called for contestants, sworn.

Direct examination by Mr. Flynn:

Q. Where do you reside?

A. No. 510 Grand street.

Q. Did you know Charles Fox in his life-time?

A. Yes, sir.

Q. When did your acquaintance with him first begin?

A. In 1832 or 1833, I first became acquainted with him.

Q. Have you been acquainted with him from that time to the time of his death?

75 A. I was personally acquainted with him from 1832 or 1833, until about 1842; I went away and did not come across him then much until 1850 or 1851, and during the intervals I have met in associations with him, until the last two years I have not seen anything of him.

Q. Could you tell us any facts in relation to him?

A. Well, I can state several facts, I suppose.

Q. I wish you would.

A. I know that repeatedly he has went out and left his shop, of an evening, alone, without a light in it, the door half way open; he kept a shoe-shop there; him and me some years ago met in an association together, and I know, while in that association, that his language there——

Q. (By Mr. Cooney.) What time was that?

A. That must have been somewhere in the neighborhood of 1841 or 1842; no, it was later than that; it must have been in 1850, along in 1850, and I know while there, having conversation with him, time and again he would fly from one thing to another, fly from one thing to another continually; and I know while I was an apprentice in his brother's shop—his deceased brother James—he has very often left the shop and

come down there flying and took his brother away from his business; and at the time he was building them houses, I think in First avenue—I won't be sure—I know he acted very strange at that time, running around.

Q. Can you describe some of his actions at that time?

A. Yes, sir; if you were talking to him about one thing, he would fly from that right to another, and naturally he would give a kind of sneer and a ha, ha, and a laugh.

Q. Anything else?

A. No; I don't know as I could state personally on Charles anything.

Q. Do you know of any other facts?

A. No.

76 Q. Do you recollect at any time his leaving the store all alone?

A. I have stated that that was done time *and* memorial, I was going to say.

Q. From the facts you have stated, what did you conclude in relation to him?

(Objected to; objection overruled; exception taken.)

A. I should come to the conclusion, if I had the privilege to base my own opinion, that the man did not have his right mind.

Q. Did you form that conclusion from those facts?

A. Yes, sir; and I formed that conclusion when I was an apprentice; come to the facts of the case, he was that way more or less, then.

Q. Did you ever notice any difference in the man between that time and the time of his death?

A. Yes, sir; frequently, I have.

Q. Did you ever notice any difference between his actions then and his actions lately?

A. I have not seen him within two years, therefore I cannot state lately.

Q. Did he always appear to be the same?

A. No, sir; not always the same mind; sometimes he appeared to be acting more like a wild man than he was like a rational being.

Q. You say you met him in political associations?

A. Yes, sir; in different associations.

Q. What were his actions there?

A. His actions, as I said before, was, sometimes he talked very close to the point, and then the next moment be right square off on another thing altogether.

Q. Have you ever heard him say anything about any letters he had written to the Government in relation to the management of affairs?

(Objected to.)

77 A. No, sir.

SAMUEL W. DISBROW, called for contestants, sworn.

Direct examination by Mr. Flynn:

Q. Where do you reside?

A. No. 73 South Fifth, Brooklyn, eastern district.

Q. How old are you?

A. If I live to see the 12th of October coming, I shall be ninety-two

Q. Did you know Charles Fox in his life-time?

A. Yes, sir.

Q. What, if any, relation was he to you?

A. He married my daughter; he was my son-in-law.

Q. How long have you known him.

A. Between forty and fifty years; I guess something over forty.
Q. How old a man was he?
A. He was sixty-nine when he died.
Q. Have you had a number of conversations with him?
A. Oh, yes; he used to call over to my office every little while.
Q. Have you had conversations with him or he with you in relation to his writing to the Government?
A. Well, about ten months ago, I think it is, he was in the office; I thought it was later than that; but, come to reflect, because I have been where I am now, I moved last May, and just before I moved he was there; he seemed to be concerned about the debt of the Government—he was going, he said, to write to the Secretary of State, or some of the head men there, and give them his opinion on the financial affairs of the country, and he thought he could give them some advice that would be of benefit to them; I did not pay much attention to him; he was a man that talked a good deal, and very stiff in his way; I made no ar-
78 gument with him; I just heard what he had to say; very frequently when he was talking he would fly from one subject to another—leave this subject and go to something else, and it was in such a confused manner I did not pay much attention; I thought it was a pretty foolish idea.
Q. Can you give me any facts in relation to him, happening about 1864, or previous to that time?
(Objected to as leading; objection overruled.)
A. Well, I don't know anything very particular about 1864, but he was frequently at my office; every time he came there he was full of speculations, and he would be all over Williamsburgh looking for lots. I kept a land-agency office, and he was calling over there to inquire of me what I thought of this thing or that thing—about different parts of Brooklyn and East New York—where he thought he could lay out his money to the best advantage, where property was improving most, something like that. He wanted my advice, because I was in the business.
Q. Do you know any other facts in relation to him about that time; anything strange in his actions?
A. Not anything more particular than formerly. I always thought his mind was a little disordered. I always calculated perhaps he might be as his father was.
Q. How was that?
A. He was a deranged man—died deranged. I lived within three doors of him. He was all over. He did not do any business. He was a man out of his mind.
Q. Do you know of his having been engaged in writing letters to the Government at this time?
A. No, sir; I don't know as he ever wrote to the Government, but he thought he could give them some instructions that would be of benefit to them about the financial affairs of the country.

Cross-examination by Mr. Cooney:

79 Q. What is your business?
A. I am in a land-agency business. I have not done much this last year.
Q. How long were you in that business?
A. About 15 years.
Q. When did Mr. Fox marry your daughter?
A. Well, I could have told if I had looked. I merely called in casually.

I could have told you exactly. I have her marriage-certificate home in my desk. She gave it to me to take care of.

Q. About how long ago?

A. I think it must be as much as forty years.

Q. Did he marry her with your consent?

A. Yes, I suppose it was by my consent. I did not like it, but I did not object.

Q. Mr. Fox was speculating in real estate all the time, was he not?

A. Oh, no, sir.

Q. When he had money?

A. No, sir; it was only late years he went into land speculation. He had a kind of land-agency himself. He collected money and kept a shoe-store.

Q. Did he not frequently come to you for advice about purchasing property, as to its value?

A. No, he did not exactly come to take my advice. He merely wanted to know, in my opinion, where it was best to lay out his money, but he was always a little stiff-headed. He would take your opinion, and then do as he pleased afterward.

Q. He was a very positive man?

A. Yes, sir; very positive in his opinions.

Q. Do you know anything about his operations in real estate?

A. Nothing, only he bought some lots in different parts of Brooklyn, he told me. He would come and tell me he had purchased. I told him I thought he did very well. I did not know anything about it, but I did not want to discourage him after he had bought them.

80 Q. Did you think he did not do well at that time in buying that property?

A. No; I never said anything against his own purchases; he did as he pleased.

Q. Did you think that his purchases were bad?

A. No. I don't know. I don't think they were bad. I could not tell you now how they might turn out. The probability is, they would be good; and if it fell, it would be bad, the same as other things—the rise and fall of property.

Q. Do you know whether or not he was not an agent for other parties in selling houses and purchasing land?

A. I don't know anything, only what he said. He mentioned that he did something of that kind. I have no personal knowledge, only what he said. He came in and had a good deal to say, and talked, and I sometimes did not pay a great deal of attention.

BENJAMIN N. DISBROW, called for contestants, sworn.

Direct examination by Mr. Flynn:

Q. You are the guardian of these contestants, are you not?

A. Yes, sir.

Q. When did your acquaintance with Mr. Fox first begin?

A. Well, something over forty years; I can't tell exactly.

Q. I wish you would go on in your own way, and state any facts you know in relation to the man from that time up to 1864, and since.

A. Some few years previous to 1860, I did not see Charles much; after 1860, I see him up to 1865. Occasionally I asked him to call on me, and he called a number of times. Several times he made stated arrangements to take tea, and came there for the express purpose. He would take off his coat and sit down, and conclude he could not

81 stay, and put on his coat again. I told him to take off his coat and sit down. He would take it off and jump up and say, "I can't stay;" and that was in most every instance—on almost every invitation. Although he came for the special purpose, you could not keep him; that is, to take tea or dinner. On one occasion I gave him an invitation to come to a party. We had a large party. He came all fixed up. He came to the door and inquired for me. I was in the basement. He came down in the basement, all dressed up. I said, "Charles, why did you not walk up in the parlor?" Said he, "I can't stay." I said, "Stay; you came by invitation." "Well, yes, yes, yes, well," said he, "I guess I won't stay." I said, "I guess you have got to stay;" but he was so determined, I had to let him go. I said "Since you have taken the pains to come, help yourself to refreshments." "No, no, no." He would not touch anything; and in regard to the Government, he seemed to think that his advice would be beneficial. He told me he was writing occasionally to this Senator and that Senator, and this Congressman and that Congressman, and he was going to write to the President. From his whole action, I always thought he was not of sound mind. I always thought he was an insane man, and have always said so.

Q. He would accept invitations from you?

A. Yes, sir; and you could not keep him. He would take off his coat half a dozen times and put it on in the course of an evening. I would say, "You have got to stay." He would say, "Do you think I had better?" "Well, yes." Then he would take off his coat and sit down again.

Q. Do you recollect any occasion when he came to your house to tea and sat down to the table?

A. Yes, sir.

Q. State what that was.

A. After a good deal of persuasion, he would put on his coat. He did that a good many times. That was in the summer-time. I don't think he put on his coat, for he had not any overcoat then. The bell
82 was rung, and I went up and saw him, and said, "Charles, come down to tea." He said, "I can't stay." I said, "You won't go." I got him down to tea, and sat down to the table. He kept crowding towards me, and got right alongside of me. He got to sitting off from the table—something like twelve inches from the table. I believe he took one sup of tea, and that was about all.

Q. Did he eat anything?

A. I think not. We never could get him to eat anything; only in one instance, that was just previously to his death, that I ever knew him to eat.

Q. From the facts you have related, what did you conclude in relation to his being of sound mind?

(Same objection, ruling, and exception.)

A. He was an insane man. I considered him so, and did so consider him ever since I have known him. His mind was disordered.

Cross-examination by Mr. Cooney:

Q. How many times between 1860 and 1865 did you see Charles Fox?

A. I did not keep in mind the number of times. I know I seen him from 1860 to 1865 a number of times.

Q. About how many?

A. Oh, I could not tell you. It might have been fifty, and might not have been over thirty—I could not say. I keep within bounds. It might have been even more than fifty.

Q. You stated in your direct examination that he never staid of an evening when he came?

A. Never could keep him any length of time.

Q. What do you mean by saying he took off his coat six or eight times in the course of an evening?

A. It was of short duration—the continuous acts.

Q. He did it without stopping?

83 A. No, sir. May be two minutes—three minutes.

Q. Six or eight times in two minutes?

A. I did not say six or eight times in two minutes. I say a number of times. I meant a number of times.

Q. When you invited him to the party, did you believe him to be crazy?

A. I most assuredly considered him so.

Q. Are you in the habit of inviting crazy people to your parties?

A. He was a brother-in-law. He conducted himself properly. Of course I considered him a member of the family, and it is my duty to ask him, in courtesy.

Q. Was his wife living at the time?

A. No, sir. She has been dead some thirty-eight years—I don't know but a little over that; at least that.

(Adjourned until Saturday, April 2d, 1870, at twelve o'clock.)

NEW YORK, *April 16th*, 1870.

ALFRED P. CLARK, called for contestants, sworn.

Direct examination by Mr. Vanderpoel:

Q. Where do you reside?

A. No. 176 Nassau street, Brooklyn.

Q. What is your occupation?

A. Boat-builder.

Q. Did you know Charles Fox in his life-time?

A. Yes, sir.

Q. For about how many years did you know him?

A. I suppose from 1835 to 1840—from boyhood.

Q. Did you know any of his relatives?

A. Yes, sir.

Q. How intimate was your acquaintance with him?

A. My intimate acquaintance did not amount to much, because I used to shun him as much as possible.

84 Q. Was there any time of his life when you were intimate with him?

A. No, sir; I cannot say there was; not very intimate; I have been in his company frequently.

Q. How frequently did you have opportunities to see him?

A. Well, I used to see him, about 1837, every other day or two.

Q. Did you see him in recent years, previous to his death?

A. Yes, sir; I saw him last May, I think it was, and spoke with him.

Q. Did he make any complaint to you at any time as to his head—his condition?

A. He did the last time I saw him.

Q. What did he say on that subject?

A. Well, he complained of dizziness, and oppression of the chest.

Q. Was this in connection with any business matter that he made this complaint?

A. Yes, sir.

Q. This business matter to which you refer, in which he complained of dizziness—what was the nature of the business; was it complicated?

A. I went there to see him at the request of Mrs. Fox, to get a certificate of the burying-ground to bury his brother, which he refused to give up, which he had, previously to my going, refused to give up.

Q. You went to talk with him on that subject?

A. Yes.

Q. And it was in that connection that he spoke of this dizziness?

A. Yes, sir.

Q. Had you noticed anything in former years, or during your acquaintance with him, as to his manner of talking?

A. Yes, sir, very frequently; that made me shun him.

85 Q. What was there about his manner of talking, which called your attention to it?

A. Well, sir, you never could get a decisive answer from him, very seldom; if you asked him a question probably he would give you an answer on something else.

Q. Was there any incoherency in his talk, running from subject to subject?

A. I don't understand that question—incoherency; what is the meaning of it?

Q. Disjointed in his conversation—disconnected?

A. Well, yes, sir; I have had him to call me in the street—stop me on my way to business; and I would turn around and go to him, and and ask him what was the question; he would wheel right square round, and leave me without telling me what he called me for; that one circumstance I remember; that must have been some time in 1837.

Q. Sometimes, in talking with him on one subject, would he continue it, or ramble off on another?

A. Generally ramble off on something else; and that was the reason that I always shunned his company.

Q. Did you notice anything about his eyes?

A. Well, I never took particular notice of his eyes.

Q. Do you say you never noticed anything about his eyes?

A. No, sir.

Q. Any peculiar look about them?

A. He always had a peculiar look in regard to the expression of his eyes; I don't know that I ever took particular notice, or thought of it.

Q. What was the peculiar look?

A. He always had a kind of distant, grum look.

Q. From what you saw of him, did you form any opinion as to the condition of his mind?

A. Yes, sir, I have.

Q. What opinion did you form?

A. Well, sir, I always considered that he was troubled with lunacy.

86 Q. Did you visit him at his house or room at any time?

A. No, sir; this last time I visited him at his room.

Q. When was that?

A. It was last May, but the date I don't exactly recollect—when his brother died.

Q. His brother had died?

A. Yes, sir.

Q. Were you at his brother's funeral?

A. Yes, sir.

Q. Was this man, Charles Fox, there?

A. Yes, sir.
Q. After that did you have occasion to go to see him?
A. Yes, sir.
Q. Was it before or after the burial of his brother?
A. Before the burial.
Q. Where was he then living?
A. In Third avenue, but the number I don't recollect—'way up the Third avenue.
Q. Was any one else living with him?
A. No, sir; not that I know of; he was alone when I went.
Q. What did you find the condition of his room?
A. Well, sir, he lived in a little room with no furniture, further than one old chair, and a table and a stove; and the chair had no bottom in it, and he asked me to take a seat, and I told him I could not sit well on such a chair; I said it had no bottom, and he went and got an old coat and laid across it and I sat on it.
Q. What was the condition of the other furniture?
A. That is all the furniture I see.
Q. What was the condition of the room as to cleanliness?
A. I did not notice the floor; there was no carpet on it. I did not exactly notice whether it was very clean or very dirty.
Q. State in detail the occasion of your visit there, and what result attended it.
87 A. I went there through the request of Mrs. Fox, his sister-in-law. I took a seat in this chair and then I told him my business. I told him that I called there at the request of Mrs. Fox, to get the deed of the plot in Greenwood Cemetery, to bury James, his brother, and he said he did not know hardly whether he would be able to find the deed or not, he was so bewildered; his papers were very numerous and he did not know as he could find it. I told him they would have to have the deed in order to bury the body; said I, "What can be done about it? You must certainly try and find it;" well, he did not know; I said, "One thing is certain, if they don't find the deed I will have to go to the heads of the cemetery and try to bury him without it;" I said, "His wife is in great tribulation about it;" "Well," he said, "I will try if I can find it; tell Mrs. Fox I will be over in the morning, if I can," and that is all the satisfaction I could get.
Q. Did you see him after that?
A. I see him at the funeral.
Q. Did you see anything of his brother James before his death?
A. Yes, sir.
Q. How as to his brother Joseph?
A. Well, I was well acquainted with him; he has been dead some years; he died insane.
Q. Joseph died insane?
A. Yes, sir.
Q. How was it with James?
A. The same.
Q. Did you know anything about his father?
A. No, sir.

Cross-examination by Mr. Pierrepont:

Q. You say you have known Mr. Fox from childhood?
A. Yes, sir.
Q. Won't you tell us how old he was when he died?
88 A. Well, sir; I think he was some sixty-eight or sixty-nine; so I understand.

Q. When did he die?
A. I don't know the date when he died.
Q. You say he was sixty-eight or sixty-nine when he died?
A. I judge so.
Q. And died when?
A. I cannot tell when he died. I don't know; he died some two or three months ago—two months ago, I believe.
Q. His brother died last May, did not he?
A. Yes, sir.
Q. What was his brother's name?
A. James.
Q. His brother died insane, did he?
A. Yes, sir.
Q. Where?
A. At his own house in Ryerson street.
Q. Was he ever in a lunatic asylum?
A. No, sir, not James.
Q. Was Joseph ever in a lunatic asylum?
A. Not to my knowledge.
Q. They were both troubled with lunacy, were they, according to your judgment?
A. Yes, sir.
Q. When did you first become acquainted with Mr. Charles Fox, the deceased?
A. That I cannot recollect. I have known him all my life, you may say; was brought up in the neighborhood with him.
Q. Where?
A. In the Seventh ward.
Q. Born there?
A. No, sir.
Q. Did you go to school together?
A. I think we did.
Q. Did he show any signs of being troubled with lunacy in his boyhood?
89 A. Well, yes, sir; he was always very evasive in his answers; never could get a correct answer from him, hardly.
Q. Was he an intelligent boy?
A. I did not take him to be; he was too sedate—too distant.
Q. Was he attentive to his duties?
A. Well, I suppose he was.
Q. What did he do after his boyhood when you knew him?
A. Well, he was apprenticed to the shoemaker business.
Q. Was he attached to that business?
A. I suppose so. I did not see anything of him during his apprenticeship.
Q. When did you next see him?
A. I could not tell when I next see him. I see him occasionally there now and then.
Q. What business did he go into after he served his time?
A. I think he went into his own business—shoe business.
Q. Did he go in as a trader in shoes?
A. No, he worked at journeywork at first, and then he went in as a trader afterwards.
Q. Did you see him when he was a journeyman shoemaker?
A. I don't know whether or not. I think not.
Q. Did you see him when he first began as a trader in shoes?

A. I see him frequently then.
Q. Where did he begin?
A. In Division street.
Q. Were you often in his store?
A. No, sir.
Q. Do you know whether he got along well as a trader in shoes?
A. All I know is what I heard. I heard he did.
Q. Did you ever hear he was inattentive to his business or negligent?
90 A. No, sir.
Q. Did he show intelligence and carefulness in his business?
A. I never was in his shoe-store in my life.
Q. Then you don't know about that except by reputation?
A. Nothing but reputation.
Q. That was good, was it?
A. No, sir; his reputation never was very good in regard to his general conversation.
Q. What do you mean by reputation being not good?
A. Distant—unpleasant.
Q. That was the fault in his reputation?
A. You asked me how he was liked—how his character was.
Q. No, I did not ask that; I asked you what his reputation was in his business?
A. Well, that is what I answered; it was not very pleasing to converse with him; as for his business matters I don't know anything about it.
Q. As to his business management, was it good or bad?
A. That I don't know anything about.
Q. You know nothing of that reputation?
A. No, sir.
Q. Do you know anything of his success?
A. Nothing further than what I hear.
Q. What do you hear?
A. I heard he made a great deal of money.
Q. But he was distant and reserved?
A. Yes, sir.
Q. Was that a reason why you refused to have much to do with him, as you say?
A. Yes, sir; because he was unpleasant to converse with.
Q. The reason you did not have much to do with him is that he was unpleasant to converse with?
A. Yes, sir; you could not get him to converse on one subject a minute before he would fly off on to something else.
91 Q. You shunned his company?
A. Yes, sir.
Q. Was that the reason you shunned his company?
A. Yes, sir.
Q. Then you were not with him a great deal, were you?
A. No, sir.
Q. How long did he continue as a trader in shoes?
A. That I cannot tell you; a great while, I believe.
Q. Did you know when he was married?
A. No, sir.
Q. Were you at his wedding?
A. No, sir.
Q. Did you visit him during his wife's life-time?
A. No, sir.

Q. Did you go to his house once during his wife's life-time?
A. No, sir.
Q. Did you go to his store once during his wife's life-time?
A. No, sir.
Q. Did you borrow or buy, or trade or sell with him, or to him?
A. No, sir.
Q. Where was his house?
A. His house, the last I knew when I visited him, was up the Third avenue, but the number I cannot tell.
Q. After he went into business, where was his house?
A. I think it was in Rivington street—some of those streets.
Q. You never went there?
A. No, sir.
Q. How long did he live with his wife?
A. That I cannot tell you. I never saw his wife in my life.
Q. Do you know how many years was he a married man?
A. No, sir.
92 Q. Do you know how many years since his wife died?
A. No, sir.
Q. Did you know when his wife died?
A. No, sir.
Q. After his wife died, were you at his house?
A. No, sir; after his wife died, I was at his house this last May.
Q. Before that?
A. No, sir.
Q. Had he any children?
A. I think he had.
Q. Are they living?
A. I believe not; they are all dead.
Q. When did his children all die?
A. That I don't know.
Q. Won't you tell us before May, 1869, the last time you were ever in his house?
A. I never was in his house in my life until last May.
Q. You never were in his house until May, 1869?
A. No, sir.
Q. That is the last time you were ever in his house?
A. Yes, sir.
Q. And you went there in consequence of his brother's death, did you?
A. Yes, sir.
Q. And had it not been for being requested to go, you would not have gone there?
A. No, sir.
Q. For you did not like to talk with him?
A. No, sir.
Q. When did you first discover that he was troubled with lunacy?
A. Well, sir, I have always thought so, by his general conversation.
Q. You thought so when a boy?
A. I don't know that I did when I was a boy—since I have matured.
93 Q. You thought so when at school?
A. No, I don't say I thought so when at school, because I never formed any opinion of him then.
Q. When did you first think so?

A. Since I have been a man twenty-one years old, I formed that opinion.

Q. How old are you now?

A. Fifty-eight.

Q. From the time you were twenty-one you formed the opinion that he was troubled with lunacy?

A. Yes, sir.

Q. And you continue it now?

A. Yes, sir.

Q. You say, in speaking about his eyes, that you did not see anything peculiar in his eye?

A. No, sir.

Q. You never had your attention called to that?

A. No, sir.

Q. But you say he was not a pleasant man?

A. Yes, sir.

Q. Distant and disagreeable?

A. Yes, sir.

Q. When you went last May did you know what finally became of that deed of the burial-place?

A. No, sir.

Q. You never heard anything more about it?

A. No, sir.

Q. Was the brother buried?

A. Yes, sir.

Q. You saw him at the funeral the next day?

A. Yes, sir.

Q. The brother was buried in the burial-place?

A. I presume so; I did not go to the grave.

Q. Do you know whether the paper was found?

A. I know nothing more about it.

Q. You say that he told you he had a dizziness of the head and that he had a great many papers, and he would try to find it?

A. Yes, sir.

Q. That he told you?

94 A. Yes, sir.

Q. He complained then of not being very well?

A. Yes, sir.

Q. And you thought he was not very well?

A. Yes, sir.

Q. Was he ever in an asylum?

A. Not to my knowledge.

Q. Was he ever doctored for insanity that you ever knew?

A. No, sir; not that I knew.

Q. Did you know whether he was successful in making money finally?

A. I judge so. I did not know anything about it.

Q. When you went to this house that you speak of last May—May, 1869—you found no carpet on the floor?

A. No, sir.

Q. And you found a chair without a bottom in it?

A. Yes, sir.

Q. If you had found a carpet on the floor, and if you had found it luxuriously and well furnished, would that affect your judgment any about his being troubled with lunacy?

A. Not at all.

Q. Then that fact did not operate at all on your mind?
A. Not at all.
Q. Not the least?
A. No, sir.
Q. Then the fact of the poorness of the furniture and the bareness of the floor had nothing to do with judgment of his lunacy?
A. Not in the least.
Q. At the time you went and paid him that visit, which was May, 1869, see if you can recall how many years had elapsed between that visit and any visit you had ever made at his store?
A. I never was in his house.
Q. How many years since you had been in his store?
95 A. I never was in his store.
Q. How many years since you had talked with him on any matter of business?
A. I guess that was about 1837; he stopped me, but he did not talk about any business after he stopped me.
Q. You had not talked to him between 1837 and 1869?
A. No, sir.
Q. Did you know anything of his habits as a miserly man, or whether he was so?
A. All I have heard his brother told me; he was very stingy and very unpleasant; his brother told me so himself.
Q. Now, how were the brothers—did they make fortunes?
A. Well, no, sir; I guess they did not make much of a fortune, but they were comfortable.
Q. In this room, where you went last May, were there a great many papers?
A. I can't tell; I did not see any.
Q. Was there any case for papers, or trunks, or boxes?
A. No, sir; all that I told you was a table with nothing on, an old stove with a pan on it, and this chair.
Q. Was there any bed in the room?
A. No, sir.
Q. Do you know how many rooms he had?
A. I presume he had another room. I saw a door.
Q. You don't know about it?
A. No, sir.
Q. You saw no papers?
A. No, sir.
Q. You saw no secretary or writing-desk in the room?
A. No, sir.
Q. That was the first room you were shown into?
A. Yes, sir.
96 Q. What story was it?
A. The second story.
Q. In the Third avenue?
A. Yes, sir.
Q. Can you give the number of that?
A. No, sir.
Q. Can you tell about where it was?
A. I should judge it was somewhere up about Twenty-first street, pretty well up; I think so; I won't be certain; it was on the way I went there.
Q. At this time you knew that he had neither wife or child, did not you?

A. Yes, sir.
Q. At this time did not you think he looked wild?
A. Well, I thought he looked unpleasant. I don't know whether it was wildness.
Q. He always looked unpleasant to you?
A. Always.
Q. Did you ever see him when to you he did not look unpleasant?
A. No, sir; I don't know that I ever did.
Q. Did you ever see any but a man troubled with lunacy that looked unpleasant to you?
A. Well, I don't know how that is.
Q. Did you ever see any man that was not troubled with lunacy who talked in a rattling, random way, and changed the subject often?
A. No, sir; I don't know as I ever have; a man that was not troubled with lunacy would answer the question direct.
Q. You never saw any except those troubled with lunacy?
A. No, sir.
Q. Is it your judgment that all people that talk at random, and suddenly change from one subject to another, are troubled with lunacy?
A. Well, sir; I should think so.

97 Redirect:

Q. Were you in the habit of meeting him and seeing him in the street from 1837 to 1869?
A. Yes, sir, very frequently; I see him in the street, but I shunned him.
Q. Can you tell about the time when his wife died?
A. No, sir.
Q. Was it recently or months ago?
A. I guess it must have been some years ago. I don't know how long.

JOHN VAN NESS, called for contestants, sworn.

Direct examination by Mr. Vanderpoel:

Q. You are a physician and surgeon?
A. Yes, sir.
Q. How many years have you practiced?
A. Twenty-two years.
Q. Where do you reside?
A. Franklin avenue, Brooklyn.
Q. Did you know James Fox during his life-time, the brother of the testator?
A. I did.
Q. Did you know Charles Fox?
A. I did not.
Q. You never saw him?
A. No, sir.
Q. What has been the general nature of your practice?
A. It has been general practice.
Q. You have never made a specialty of any particular disease?
A. No, sir; not of insanity; no, sir.
Q. In your preparatory studies, before entering upon the practice of your profession, did you have occasion to attend lectures and read works on diseases of the mind?

98 A. Yes, sir.

Q. Have you since that time had occasion and opportunities for studying mental diseases?

A. Not to any very considerable extent.
Q. Have you had some?
A. Well, some, yes, sir; there are cases that have come under my own observation.
Q. Cases have from time to time occurred in the course of your own practice?
A. Yes, sir.
Q. While you never have made a specialty of the study?
A. Yes, sir.
Q. Have you been present during any portion of the trial of this case?
A. I was present on one occasion.
Q. About when was that?
A. I think that was the first assembling.
Q. When Mrs. Murawski and Mary Fox were examined?
A. Yes, sir.
Q. Did you also hear the testimony of Mr. Alphonse?
A. Yes, sir.
Q. And of Mr. Ferguson?
A. I won't be sure as to that name; I was present during the whole of that sitting.
Q. Did you hear the testimony given by those witnesses?
A. I did.
Q. Have you since that time examined the notes of the evidence given by those witnesses, as taken by the stenographer, or as you understood it was taken by him?
A. I have.
Q. From the statements of the witnesses at that time, given in your presence, on the stand, did you form any opinion as to the soundness or unsoundness of the testator?
(Objected to that the witness is not shown to be an expert.)

99 Cross-examination by Mr. Pierrepont:
Q. You live in Brooklyn, and have lived there many years?
A. Yes, sir.
Q. You have not made insanity or diseases of the mind a special subject of study.
A. No, sir.
Q. You would not consider yourself an expert in that department of your profession, would you?
A. No, sir.
(Objection renewed.)
Q. (By the surrogate.) Did you ever have any cases of insanity which you have treated?
A. Yes, sir.
Q. How many?
A. Perhaps fifty in my time.
Q. You treated those cases?
A. Yes, sir.
Q. (By Mr. Pierrepont.) Do you consider yourself competent to speak as an expert, from the testimony of others, about this delicate question of insanity from your experience?
A. Well, sir, it is a pretty difficult question to answer; some might consider me so, in a comparative point of view; I don't consider that I am, compared to very many who have had opportunities far exceeding anything I have had, to give an opinion in these matters.

Q. When you speak of the number of cases that you have had, do you mean that you have treated cases of insanity, and made that your business to treat them through their varied stages—I mean those you have had?

100 A. I have had no case of insanity that I have treated to the termination of the disease—no case. The cases that have come under my observation have been cases that have ultimately been sent to our public institutions.

(The objection to witness not being competent to testify is overruled; exception taken.)

Direct continued:

Q. From the statement of the witnesses at that time, given in your presence, on the stand, did you form any opinion as to the soundness or unsoundness of the testator?

A. I did.

Q. State what your opinion was on that subject.

(Objected to; objection overruled; exception taken.)

A. My opinion was that he could not have been a man of sound mind.

Q. Is there such a disease as hereditary insanity?

(Objected to; objection overruled; exception taken.)

A. It is usually classed as a disease, although physiologists do not regard it as a disease; but medical authors and writers usually treat it as a disease, and it is classed with rheumatism and gout, and hydrocephalus and scrofula, and all those forms as a disease; that is the usual view taken by medical authors.

Q. As a disease, is it hereditary?

101 A. It is, undoubtedly.

Q. Did you know the father of Charles Fox?

A. No, sir.

Q. You never saw him?

A. No, sir.

Cross-examination by Mr. Pierrepont:

Q. When you gave an opinion from the testimony of the witnesses, Mrs. Murawski and Mary Fox, your opinion was given upon the supposition that all they had stated was true?

A. It was.

Q. Not from any knowledge of your own?

A. No, sir.

Q. But as taking the facts they testified to as being strictly true; upon that you based your opinion?

A. Yes, sir; upon that I discriminated somewhat in having heard the cross-examination; I discriminated in regard to what was recognized as true in the premises.

Q. Do you think that if those statements which you heard, and on which you based your opinion, were true, that the man could not be competent to do business?

A. I think he might.

Q. You think he might be competent?

A. Yes, sir.

Q. Do you think he would be able, intelligently, to carry on a large business?

A. If you mean by that successfully, I think he might.

Q. I do mean successfully?

A. I think he might.

Q. Do you think that such a man as that would be responsible for any act of his, whether it be criminal or fraudulent?

A. I have not considered that point.

Q. You say you think he would be able to carry on business
102 successfully. If he undertook to commit a fraud in business, do you think he would be morally responsible in your judgment? Would you say such a man was responsible for a fraudulent act committed in business?

A. I should hardly think he was—I should hardly think so; still, I should like to consider that point very considerably more than I have before being satisfied fully in my own mind; I should hardly think, however that he was.

Q. Do you think he would know how one result would follow a given act, or a given series of acts?

A. Yes, sir.

Q. Would you believe such a man as that competent to know the mode of carrying on business in the best way to meet with success?

A. As I said before, I think that might be the case; and we have instances of that being the case.

Q. Do you think such a man, if he made his will, would be competent to see the bearings of that will?

A. I should think he might—yes, sir.

Q. Do you think that if such a man should make a deed of his property, and execute it, and receive the money for it, would you think that such an act as he was competent to perform?

A. I should think he was competent as a man of unsound mind—that is, as a monomaniac.

Q. Would you consider him responsible to perform such an act as to make a sale of property and receive the pay?

A. I should certainly regard him as competent to do it.

Q. You would not consider him, then, an insane man when you say "not of sound mind;" won't you tell us what you mean by that?

A. Well, I mean that he may be very sane on most subjects—that in business matters he may be singularly shrewd and apt, and his monomaniacism may take that direction, and yet he may not be of sound mind; he may be insane on very many subjects.

103 Q. He may be a monomaniac upon the subject of business?

A. Yes, sir.

Q. Won't you explain to the court just what you mean by a monomaniac?

A. It means simply that a person may be sane on most subjects and insane on some particular subject.

Q. What was the particular subject in which you give your opinion that he was not of sound mind?

A. I should judge from the evidence that in his general—I should consider that he prosecuted his business with the aptitude and shrewdness of a monomaniac.

Q. On the subject of business?

A. Yes, sir.

Q. And that is what you mean?

A. That is what I mean.

Q. You have known a great many people, have you not, that seemed to be monomaniacs in some particular way?

A. Yes, sir.

Q. Would you consider, in all instances, where a rich man, who had acquired a fortune, was living in a very humble and mean way, so far

as expenditure went, and was saving every cent in the most miserly way—you would consider him a monomaniac upon that subject?

A. I should not, sir—not with the attending circumstances that you have now named, simply.

Q. What would need to be added to make him a monomaniac?

A. Well, the facts that have been presented in the evidence, in regard to which I expressed my opinion.

Q. And your opinion is, that upon that subject of business he was a monomaniac?

A. Yes, sir.

Q. Won't you give the reason why, on that subject of business, you regarded him as a monomaniac?

A. Because I consider that a person who gave such very decided evidence of unsoundness of mind could not prosecute a business successfully except upon that hypothesis.

104 Q. That he was a monomaniac upon that?

A. Yes, sir.

Q. That is your argument that convinces your mind?

A. That is my idea.

Q. Have you ever known men that were misers?

A. Pretty near. I don't know that I have in the true sense of the term.

Q. If you should know a man that was, in the sense you have spoken of, a monomaniac upon business, and devoted himself in the most miserly and exclusive way, up to the age of seventy years, to the acquisition of money, and should all of a sudden give it all away, would not you think that he was insane, or a monomaniac?

A. Yes, sir; I should.

Q. Did you regard the late Mr. Peabody as one of that kind, for he was exactly that man?

A. No, sir; he was saving, but not miserly.

Q. These witnesses, of whom you have spoken, did you read their cross-examinations?

A. No, sir; I was present at the cross-examination at the first sitting?

Q. But did you not hear the others?

A. No, sir.

Q. And you have not read it?

A. No, sir.

Q. But you did read the direct afterwards?

A. Yes, sir.

Q. But not the cross?

A. No, sir.

Q. Did you hear the cross-examinations?

A. Yes, sir.

Q. You listened to them?

A. Yes, sir.

Q. After that you read the direct-examinations?

A. Yes, sir.

Q. But not the cross-examinations?

A. No, sir.

105 Q. You are aware that a direct examination is sometimes somewhat varied by a cross-examination, are you not?

A. Yes, sir.

Q. There are a good many different views that people, who are physicians, entertain as to whether a man is of sound or unsound mind?

A. Yes, sir.
Q. Very varied?
A. Yes, sir; quite so.
Q. Is not it a very difficult thing to determine?
A. The exact line is very difficult.
Q. Do you find, from your experience as a physician, the same thing is true that others, who know most about it and study it most, are apt to think everybody crazy?
A. I cannot say that I have been of that mind.
Q. Have not you found that those who are devoting themselves very much to it—those who are living with insane people, are apt to think that most people are insane, more so than those who are not so much with them?
A. I don't know that that is the case.

Redirect.

Q. Did you notice the testimony with regard to his conduct toward his relatives, and his feelings towards them?
A. Yes, sir.
Q. And as to his fears of their poisoning his food?
A. Yes, sir.
Q. Did you regard him as a monomaniac on that subject—suspicious of his relatives?
(Objected to.)
Q. Were the facts testified to, indicating suspicions of his relatives, any evidence of insanity on that subject?
106 A. Not necessarily; no, sir.
Adjourned until Monday, April 25th, 1870, at twelve o'clock.

NEW YORK, *June 1st*, 1870.

Mr. Ritterband announced that Homer A. Nelson, esq., had been retained as counsel for the executors. Mr. Nelson appeared.

Contestants rest.
Adjourned until Monday, June 6th, 1870, at twelve o'clock.

NEW YORK, *June 6th*, 1870.

JOHN H. TRIPLER, called for proponents, sworn.

Direct examination by Mr. Pierrepont:

Q. Where do you live?
A. 386 Cumberland street, Brooklyn.
Q. Where do you do business?
A. 394 and 396 Grand street, New York.
Q. How long have you done business in that place?
A. Twenty-two years next September.
Q. What kind of business is it?
A. Men's furnishing goods.
Q. Did you know Mr. Charles Fox in his life-time?
A. I did.
Q. When did you first become acquainted with him, about how many years before he died?
107 A. Well, I have been intimately acquainted with him for the last ten years; I have known him as a customer longer than that.
Q. How near your store was his place?
A. Pitt street.

Q. How far from your store?

A. It is only a few blocks from my store; my store is between Suffolk and Clinton, and that is in Pitt street, near Grand.

Q. During these years how often did you see him?

A. Well, he used to come in several times a week—evenings; come in in the evenings often; oftentimes when he was passing in the daytime he would stop in.

Q. Did he use to stay there any length of time?

A. Sometimes he would be there hours at a time, talking.

Q. And how about his habits of a Saturday nights?

A. When ever we werebusy Saturday nights and needed any assistance, he would always take hold and help us—sell goods as if he belonged to the store.

Q. Did he do that frequently?

A. Very frequently, during our busy season.

Q. You knew him with great intimacy?

A. Yes, sir.

Q. During all this time, what did you find the condition of his mind as to shrewdness and good sense in business?

A. He was a good business man, so far as I saw.

Q. How did you find his mind as to soundness?

(Objected to. Objection sustained.)

Q. Did you have social intercourse with him in the way of dining?

A. We often used to take dinner and tea together; it was quite common; he would stop at my store, and we would go together.

Q. As to going on excursions?

108 A. We have frequently been to Rockaway and Coney Island, and such places.

Q. From all your long intercourse with him, social and business, the facts you have detailed here, will you state what was the opinion you formed as to the soundness of his mind.

A. I never saw anything out of the way about him, any more than anybody else.

Q. What would be your opinion as to his sanity?

A. I never have been led to doubt it, except from what I have seen in the papers.

Q. You never had a doubt of his sanity?

A. I never thought of such a thing before.

Q. Did you know any man more sane than he?

A. I did not.

Q. How were your relations as to intimacy and frequent meeting in 1864?

A. During the war he was in the store a great deal, as much so as any other time, because we were busy.

Q. And during the year 1864?

A. Yes, during the year 1864; during the war, all through, until he moved up town, we were quite thick together until he went up to Third avenue, and then we did not meet so often.

Q. Do you know when he did move up?

A. I could not tell the precise time.

Q. About when?

A. I could not tell much about that, because it did not make any impression on my mind.

Q. It was after 1865, some time?

A. Oh, yes, sir.

Cross-examined by Mr. Flynn:

Q. Do you say, during that long intimacy with him, you never noticed anything peculiar?

A. Nothing any more peculiar than I did about anybody; everybody has got their peculiarities.

109 Q. Relate some of the peculiarities you noticed in him.

A. I don't think of anything, just this moment, peculiar at all.

Q. Did he have the same peculiarities that other people have?

A. Yes; the same peculiarities that other people have.

GEORGE G. HALLOCK, called for proponents, sworn.

Direct-examination by Mr. Pierrepont:

Q. State your business.

A. Real-estate agent.

Q. How long have you been in it?

A. About twenty-three years.

Q. Where do you live?

A. I reside at 253 East Broadway.

Q. Where is your place of business?

A. The same place, at present.

Q. Did you know Mr. Charles Fox before he died?

A. Yes, sir.

Q. For how many years?

A. I suppose I have known him by sight twenty-five years; I knew his place of business and knew the man.

Q. How long did you know him personally, to converse with him, and have relations with him?

A. Oh, well, I knew him so as to speak to him in the street, and he would occasionally stop me, and we would have a little conversation, and go on.

Q. Did you ever have any business with him?

A. I never had no business, any more than my folks used to buy shoes at his store years ago.

Q. Did you have that relation with him of purchasing goods?

A. I did not, myself; some of my family used to purchase the shoes.

110 Q. Did you have anything to do with him, connected with the bills?

A. I used to pay the bills.

Q. Did you use to, to him?

A. Yes, sir.

Q. Did you continue to be acquainted with him?

A. Yes, I continued, but not business acquaintance.

Q. I mean acquaintance?

A. Oh, yes, sir.

Q. Did you use to talk with him?

A. Yes.

Q. Down to how near the time of his death?

A. I think the last time I saw him was in the winter of 1869.

Q. You knew him in 1864, did you?

A. Yes, sir.

Q. Did you have conversation with him during all these years?

A. Well, occasionally I would have conversations with him on the street merely, and sometimes I might meet him in the store, and we would have conversations.

Q. And what did you converse about?

A. I suppose different things. I remember the last conversation we had more particularly. I don't remember former conversations.

Q. You conversed about general affairs?

A. When we met generally—yes, sir—business affairs.

Q. You knew him well, then, for these many years?

A. Oh, yes, sir. I have known the man a good many years.

Q. And in these relations of which you have spoken, and different meetings and conversations of which you have spoken, have you formed any opinion as to the soundness of his mind, his intellect; and, if so, what was it?

(Objected to, that no conversations or facts have been detailed by the witness.)

111 Q. During the war, did you have conversation with him?

A. I could not say particularly about that—I know I did after the war.

Q. What were the conversations relating to?

A. Relating principally to real estate, and its inflation, with other things, and he asked my opinion whether I thought it would keep up at its present value, then, or whether it would recede again?

Q. And before that, did you have conversations about real estate?

A. I think I have, though I don't remember anything particular. We used to meet occasionally and stop.

Q. Did you have conversations about the general subjects of the day?

A. Yes, sir.

Q. About, for instance, political affairs?

A. I suppose we have, sometimes, but I don't remember anything definite about our conversations, only relating to general business—only that particular time that I saw him about real estate.

Q. Relating to general business, and your real-estate business?

A. Yes, sir.

Q. From these conversations, and acts, and declarations, what was your opinion as to his being of rational or irrational mind?

(Objected to. Objection overruled. Exception taken.)

A. I never had the least idea that the man was irrational on any subject that I ever conversed with him upon, but that he was perfectly rational—just as much as I was myself.

Q. Then of course you never supposed him in the least insane?

A. I did not—no, sir—never.

Q. Had you any doubt about it in your own mind?

112 A. None at all; such a thing never occurred to my mind—never had such a thought.

Cross-examined by Mr. Vanderpoel:

Q. Did you ever see him excited?

A. I never did—I don't think I ever saw him excited.

Q. Did you ever hear him speak of his relatives?

A. I never did—only his former wife—that is all.

Q. Those were mere casual conversations with him?

A. Yes, sir; I suppose so—merely casual. I frequently saw him, because I lived in the neighborhood where he resided a good many years.

Q. You never had any business transactions with him, only some little talk?

A. In reference to business and general matters.

Q. Asking your opinion about something?
A. Yes, sir; something like that.
Q. You never had any interest in any of his affairs, did you?
A. No, sir; I never had any interest.
Q. You never had any occasion to question his word in any way, had you?
A. Well, no; but I always believed that he was a truthful man.
Q. You never had any occasion to doubt his word in any shape or form?
A. No, sir.
Q. You never crossed him in any way?
A. I think not.
Q. It was always harmonious between you?
A. Yes, sir; perfectly so.
Q. There was never any occasion for any excitement in your conversations with him, was there?
A. Nothing special; we were all a little excited during the war, but I don't remember anything.
Q. Was he considerably excited during the war?
A. Not that I know of; I never saw him when I thought he was any way excited.
113 Q. He was not excited at all about the matters connected with the war?
A. I do not know whether he was or not; he never was in my presence.
Q. When did you get acquainted with him?
A. I got acquainted with him a number of years—good many years ago.
Q. How many years?
A. I suppose twenty-odd years ago.
Q. Did you know his father?
A. I cannot say that I did.
Q. Do you know whether his father did or did not die insane?
(Objected to.)
Q. Had you understood it?
(Objected to.)
Counsel for contestants offer the testimony, not as affirmative evidence of the insanity of the father, but to attest the strength to which the witness' attention has been applied to the mental condition of the deceased.
(Objection sustained; exception taken.)

Adjourned until Tuesday, June 14th, 1870, at 11 o'clock a. m.

NEW YORK, *June 23d*, 1870.

SARAH J. TITLER, called for proponents, sworn.

Direct examination by Mr. Ritterband:

Q. Where do you reside?
114 A. 726 Third avenue.
Q. Are you engaged in business there?
A. Yes, sir.
Q. What is your business?
A. Millinery and fancy goods, and Butterick's patterns.
Q. How long have you done business there?
A. A little over ten years.

Q. Did you know Charles Fox in his life-time?

A. I did, for many years.

Q. About how many years were you acquainted with him?

A. Well, sir, it is somewhere between thirty and forty years from the time he first moved in Division street; he moved to the second door from where I resided.

Q. You knew him when he lived in Third avenue?

A. I did; from the time I was first acquainted with him until a week or ten days of his death, I was in the habit of seeing him every once in awhile.

Q. Confine yourself more particularly to about the last ten years; how frequently did you see him and converse with him during that time?

A. Sometimes I would see him once or twice a week; sometimes not quite so often; my business demands my being out a great deal, and I would meet him very often, and always would have conversation with him about different things.

Q. Did you meet him in the street frequently?

A. Yes, sir.

Q. Did you see him at his house?

A. Yes, sir, I have; I guess it was about eighteen months ago; I went to his house with a friend to ask some advice of his about some business affairs of hers.

Q. Were you and this friend in the habit of consulting him on business affairs and taking his advice?

A. We have done so.

Q. You were very intimately acquainted with him then as a friend?

115 A. Yes, sir; I was acquainted with his wife very intimately and his mother also.

Q. Did you visit him during the life of his wife?

A. As neighbors we used to be in and out a great deal.

Q. So that you had good opportunities during those thirty or forty years of cultivating his intimate acquaintance?

A. Yes, sir.

Q. Do you recollect when you last saw him?

A. Well, it might be ten days; it might have been two weeks, but I think not, before his death.

Q. You have spoken of conversations frequently—business conversations?

A. Yes, sir.

Q. And other conversations?

A. Yes, sir; everything, almost.

Q. Upon every subject almost?

A. Yes, sir.

Q. During all these conversations and during all that time, did you observe anything to indicate unsoundness of mind?

(Objected to. Objection sustained.)

Q. State what you observed with reference to his conduct.

A. I always found him very gentlemanly; he behaved as other gentlemen do.

Q. (By the surrogate.) As to his intelligence, how was that?

A. I thought he was remarkably intelligent; he could converse on almost any subject.

Q. And you have conversed with him upon almost every subject?

A. Yes; certainly I have.

Q. He always conversed intelligently and rationally?

A. Yes, sir; certainly.

116 Q. From all the conversations that you have stated, will you give us your opinion as to whether he was of rational or irrational mind?

A. Well, sir, I suppose he was as much so as anybody I ever knew.

Cross examined by Mr. Vanderpoel:

Q. You never noticed anything peculiar about him?

A. No, sir.

Q. How old are you?

A. I am a little over sixty. I am about sixty-two.

Q. Did you ever have any business with him?

A. No, sir; nothing special. I have asked his advice sometimes in business transactions.

Q. You never saw him excited about anything?

A. I have seen him in deep sorrow when he lost his wife and little ones.

Q. He was very gloomy at those times?

A. I think he grieved very much.

Q. Did he grieve more than other men do under like circumstances?

A. No, sir; I don't know that he did.

Q. There was nothing peculiar about that?

A. No, sir.

Q. You never saw him under any peculiar circumstances?

A. No, sir; only those circumstances that are very trying to anybody.

ALBON P. MAN, called for proponents, sworn.

Direct examination by Mr. Pierrepont:

Q. How long have you been an attorney and counselor in the city of New York?

A. Over thirty years.

Q. How long have you known Mr. Fox, the maker of the will?

117 A. About eight or ten years.

Q. Will you state in what way you have known him, and what have been your relations?

A. He has been agent for some estates for the owners of whom I was counsel, and has frequently had occasion to call upon me upon that business; and I have seen him in some incidental matters also; mostly, however, in that way.

Q. And how many times?

A. I cannot specify the number; probably fifty times, probably more; a little less, perhaps.

Q. And in these business relations you had to do with him?

A. Yes, sir.

Q. And in whatever the others were that you spoke of, did you have conversations with him about other matters—other than business?

A. Yes, sir; frequently. He was quite social and conversed upon many subjects; sometimes upon the subject that most absorbed our attention during the time—that was the war and the general affairs of the Government.

Q. Did he show any special interest in that subject?

A. At the time of making his will, yes; and on other occasions, too.

Q. Did he say anything about the former war in which he was engaged; or what did he say on that subject?

A. He spoke of having been either in the service of the United States, or else performing work for the Government, during the war of 1812.

Q. State what he said showing interest in the subject of the war and of the United States.

A. I cannot give the identical words; but showing his warm interest during the progress of the war, his warm interest in the success of the United States Government; a general conversation, such as was a matter of daily matter of course with us during the war.

Q. Take the will before you. Do you see any remarks of your own upon that paper?

118 A. Yes, sir; I did notice a few words in pencil in two places.

Q. Won't you state under what circumstances you made those remarks, and the conversations between you and him in relation to it?

A. He called one day and exhibited to me the draft of a will which he had drawn, and asked me to look at it and see if it was correct—if it would answer the purpose; the substance of it was the same as this; I cannot say whether this was the paper that he showed me at that time; I should rather think not, although its provisions are similar; I think the language of this is a little more explicit—I mean to say a little more in legal form—than the one he first exhibited to me.

Q. When he exhibited to you the will, did you make any suggestions about the legal form?

A. I made some corrections upon it in pencil, more than I see upon this paper; that is, according to my recollection.

Q. That is, how to put it into the legal form?

A. Yes, sir; I cannot say that this is the legal form that I put it in, but it is similar.

Q. And this is similar to what you did advise him to do?

A. It is similar in effect; I cannot remember the words of my correction.

Q. You knew then the substance of the will he was about to make?

A. Yes, sir.

Q. Did he express to you any wishes on the subject?

A. Yes, sir; he expressed his wishes.

Q. What did he tell you?

A. He told me his intention was to leave his property to the Government of the United States for the payment of its debts, and I made some inquiry in regard to his situation as to relatives, and he gave me to understand——

Q. Give the substance.

119 A. The substance was that he had no relatives so near that he cared to give his property to them; he preferred giving it to the Government.

Q. To aid in payment of its debts?

A. Yes, sir; he seemed to have made up his mind deliberately to do that.

Q. You speak of his mind—that he seemed to have made up—what kind of intelligence did he show in relation to his business so far as related to his mind?

A. It was quite clear, quite business-like.

Q. And so far as related to all other subjects upon which he conversed?

A. Quite sensible.

Q. And at all times how was it?

A. I never saw any difference in that respect.

Q. Touching his mental condition, from all you saw of him—from these interviews of business and otherwise—what could you say?

A. Well, sir, I could say he was quite intelligent and understood very well what he was doing.

Q. What would you say as to the soundness or unsoundness?

A. I never saw any indication of unsoundness of his mind.

Q. Nothing that led you to any such belief?

A. Nothing of the kind; quite the contrary.

Q. You have seen him write, have you not?

A. Yes, frequently.

Q. Will you state in whose handwriting the body of the will propounded is?

A. It looks like his.

Q. Have you any doubt it is his?

A. I should say it was his from my general knowledge of the character of his writing; I have noticed his signature.

Q. Will you look at the book before you (hands witness a book) and state, in your opinion, whose handwriting that is?

A. It looks like his.

120 Q. You believe it to be his?

A. Yes, sir. It looks decidedly like his as I turn it over. He has rendered me accounts on several occasions, and I have seen him write frequently. I could not be positive as to the writing there, but it bears every resemblance to his writing, and I should think it was his.

Q. You believe it to be his?

A. Yes, sir.

(Counsel for the United States offers in evidence said book, which purports to be a diary of the testator.)

Q. Won't you state how he was as to manner in business?

A. Quite regular. Quite exact in accounts.

Q. As to being methodical?

A. He was decidedly so. He was particularly so in regard to the accounts that he rendered to me, and this business of Mrs. Dean's, about which he called upon me many times, was very complicated, and he showed a great degree of intelligence in regard to it.

Q. How as to his clearness in understanding and unraveling the complications?

A. He was quite equal to ordinary business men in that respect.

Cross-examined by Mr. Vanderpoel:

Q. Did you know he had any relatives?

A. Only from his own statements.

Q. Did you know from his own statements that he had any relatives?

A. I only knew from what he said. He signified to me that he had none near enough that he cared to give his property to them.

Q. Did he say how near they were?

A. I understood quite remote.

Q. How many degrees off, four or five?

121 A. I should infer that he had neither children, parents, nor, probably, brothers or sisters. I think that would be the effect of his conversations.

Q. Anything as to nephews and nieces—can you tell?

A. I could not be positive. I don't know that I pursued the inquiry closely—beyond a general expression.

Q. You understood him to say that he had no brothers living?

A. That he had no relatives near enough to care to give his property to.

Q. Did you inquire anything about his family?

A. I inquired whether he had near relatives to take his property, or such. He made the expression to me that he had not.

Q. You inferred from his conversation that he had no brothers or sisters living?

A. That he had no near relatives. I should infer from his conversation that he had not.

Q. According to his general conversation, he gave you to understand that he had no brothers or sisters living?

A. I cannot say that he said that, positively.

Q. And you did not ask?

A. I asked him whether he had not relatives, or else he said to me that he had none near enough to leave his property to them.

Q. You did not ask whether he had any brothers?

A. I may have done so. I only inferred from the conversation that he had none near enough—no immediate relatives—none that were near to him.

Q. You did not draw this will, did you?

A. My impression is that the original draft which he presented to me I only corrected in pencil.

Q. Do you know where that original draft is?

A. No, sir. He took it away with him. It is possible this may
122 have been the paper, and that the balance of my pencil-marks—the other pencil-marks—may have been erased, though I don't see any signs of it.

Q. When did you put any pencil-marks on this paper?

A. It was in his own hands. My inference from seeing this with so few pencil-marks on it is that he probably brought it back to me after he had executed it, but that I cannot say. I cannot say that I spoke to him more than once on the subject of his will. This may have been the identical paper he showed me; it is the same in purport, but I remember making more corrections than appear upon this paper.

Q. Do you know whether you saw it after it was executed until after *its* death?

A. I take it I must have seen this after it was executed; I should judge so. I cannot say—be positive whether I saw it after or before it was executed; I certainly saw it after it was prepared as it is now.

Q. Did you ever hear him speak on any other occasion of his relatives?

A. I cannot be positive as to that.

Q. Have you any recollection of it?

A. I had quite a long conversation with him, almost the last interview, traveling from my own house to Mrs. Dean's and back again; a variety of conversation.

Q. I want to know if you remember his making any reference to his relatives on any other occasion than the one when the draft of will was shown you?

A. I have no distinct recollection.

Q. Have you any recollection?

A. No, sir; you may say I have no recollection.

Q. Did you learn from him whether he had ever been married?

A. I don't recollect that.

Q. Did you ever hear him speak unkindly of his relatives, or of any relatives?

A. No, sir.

Q. When you were with him, did he talk much of the war?

123 A. Well, I don't know that it was a great deal; it was a matter of conversation with every one that one met in those times.

Q. Was there anything peculiar about him in that respect?

A. Nothing except his loyalty.

Q. That was a peculiarity; do you mean that was something peculiar to him?

A. I don't know that it was more peculiar to him than to any others.

Q. I asked whether there was any peculiarity?

A. It was very decided.

Q. Do you mean that he was opposed to the war?

A. No, sir; quite the contrary.

Q. Then there was no peculiarity about him in that respect?

A. Nothing more than his distinct loyalty, if you call that a peculiarity.

Q. You never heard him say much on the subject?

A. Yes, sir; a good deal.

Q. (By Mr. Flynn.) Did not you draw the original will, or the one that was presented to you for correction, and did not you correct it by inserting "to the Secretary of the Treasury for the time being?"

A. Well, I should rather think so, but I cannot be positive.

Q. You do not hold yourself responsible for that peculiar expression in the will?

A. No, sir; I made such correction on his draft that I thought would be entirely effectual to answer his purpose. This is my impression—not that the money was to be given to the Secretary of the Treasury, but that was the channel of payment, but I cannot say positively as to that.

SAMUEL T. BROWN, called for proponents, sworn.

Direct examination by Mr. Pierrepont:

Q. What is your occupation?

124 A. I am vice-president of the Mechanics and Traders' Bank in this city.

Q. Did you know Mr. Fox in his life-time?

A. Yes, sir.

Q. State how long you knew him, and in what way you knew him.

A. I have known him some six or seven years as a depositor with us.

Q. How often did you see him?

A. Possibly once a month—it might have been oftener.

Q. Did you ever have conversation with him?

A. Nothing more than passing the time of day, or something relating to his banking-business.

Q. Did you have those conversations?

A. Yes, sir.

Q. Will you state how he was as to the manifestation of intelligence and clearness in his business?

A. I never had any reason to doubt it; he seemed to understand what he was about, and knew perfectly well what he was doing.

Q. As well as any other man?

A. As well as any other man.

Q. In those business relations of which you speak, you observed his kind of mind; I suppose you did?

A. No more than I would with any one else that came in.

Q. The same as you would with any one else?

A. Yes, sir.

Q. Did you observe anything in his mind that was indicative of any unsoundness?

A. No, sir.

Q. You found him as sound as any man, did you?
A. Yes, sir.

Cross-examined by Mr. Vanderpoel:

Q. Did you ever pay any attention to him?
125 A. No more than I would to any one else that came in, ask me a question about business matters, or pass the time of day.
Q. Pass the time of day, saying merely, "Good morning," or "How are you?"
A. That is all.
Q. Do you remember his coming to ask you any question?
A. Yes, sir; he came in once or twice or three times, and asked when I had heard from Mr. Price, a gentleman for whom I think he was agent, collecting rents.
Q. That is all you ever knew of him?
A. Yes, sir.
Q. You never had any other business transactions with him, or any social intercourse with him in any shape or form?
A. No, sir.

WILLIAM MILES, called for proponents, sworn.

Direct examination by Mr. Pierrepont:

Q. Please state your occupation.
A. My regular business is hides and leather; I am engaged now in the banking business; I am president of the Six-Penny Savings Bank at present.
Q. Did you know Charles Fox in his life-time?
A. I did.
Q. How many years?
A. I should think some thirty years, more or less.
Q. In what way did you know him for these thirty years?
A. I knew him from having seen him frequently in my brother's store, and I have been into his store, and I have met him good many times during the war; that period I never had any particular communication with him.
Q. During these thirty years had you conversations with him?
A. To some extent—yes, sir; very slightly, though.
126 Q. How was he in his business affairs, so far as it was manifested in his business?
A. I always looked upon him as a remarkably safe, prudent, and sound man myself.
Q. And how in his attention to business and carefulness?
A. Very careful and very attentive.
Q. How in the intelligence that he manifested did you find him?
A. I should class him as a man of superior intelligence.
Q. And how as to soundness of intellect?
A. Pefectly sound.

Cross-examined by Mr. Vanderpoel:

Q. Did you ever have a business transaction with him?
A. No, sir; not myself. He used to deal in my brother's store.
Q. Did you ever know any of his relatives?
A. No, sir.
Q. Do you know whether he had any brothers or sisters?
A. I do not.
Q. Have you seen much of him during the last ten years?

A. Well, I used to meet him every once in a while.
Q. How meet him—just casually in the street, and say how do you do?
A. Yes.
Q. Is that about all you have known of him for ten years past?
A. Yes, sir.
Q. You had no other intercourse with him for ten years, only as you would meet him in the street and pass the time of day and pass on about business?
A. That is all.

127 Redirect:

Q. What were you about to say about his business?
A. He dealt with my brother-in-law, a few doors below where he kept store; I seen him there and observed his manner of doing business, and have conversed with my brother-in-law in relation to him.

Recross:

Q. How long ago was the last you saw him there?
A. It must have been ten or twelve years ago.

JACOB MILES, called for proponent, sworn.

Direct-examination by Mr. Pierrepont:

Q. Did you know Charles Fox in his life-time?
A. Yes, sir.
Q. How many years did you know him?
A. I had business with him for about twenty years or less.
Q. How many times have you seen him; have you seen him many times?
A. During that time I used to see him probably once every week or two.
Q. In what way did you see him?
A. I used to sell him leather.
Q. Did you often see him?
A. Yes, sir.
Q. And in that business he was in your store?
A. Yes, sir.
Q. Were you in his store?
A. Yes, sir; not often, however.
Q. Did you see your brother there, that has just testified, in your store?
A. I don't remember that I did.
Q. He was often in your store, your brother?
A. Yes, sir; frequently.

128 Q. How did Mr. Fox appear as a business man?
A. Quite correct.
Q. How as to be methodical and careful?
A. Very much so.
Q. How as to showing intelligence, clearness, and preception?
A. Very much so; more than the generality of those that came in my store.
Q. How as to soundness of intellect?
A. I once had occasion somewhat to doubt his intellect—to doubt what he was talking about; he used to talk a great deal about buying real estate; I supposed that he was comparatively a poor man, but he used frequently to speak of going down to the Exchange and talk about buying a great deal of real property. I inquired of a neighbor, and to

know if he was a rich man, and had made those purchases; he said "No," he was insane.

Q. How did you find him?

A. I found him quite correct in everything, and quite intelligent in everything.

Q. How did you find him as to soundness of mind?

A. Quite so; I saw nothing to indicate any doubt, except that I did not suppose he had so much property; he was doing a small business.

Q. You were surprised afterwards to find he had?

A. I did not know anything about it until I saw the account of his will; then I supposed what he was talking about was correct.

Cross-examined by Mr. Vanderpoel:

Q. Who was that neighbor that told you he was insane?

A. His name was John Nightingale, a man in the same business with himself—shoe business.

Q. Where?

A. He was within a door or two of Mr. Fox.

Q. Where is he now?

129 A. The last I knew of him, he was somewhere in the Eighth avenue in this city.

Q. From his conversation on that subject, you thought he was queer, didn't you?

A. No; I asked this neighbor if he was a wealthy man; he said no; he said he was insane talking about real estate.

Q. How many years ago was that?

A. Fifteen or twenty years ago.

Q. You have not known much of him the last ten or twelve years?

A. No, sir.

Q. What amount of real estate did he speak of buying?

A. To the best of my recollection, he talked of buying real estate to the value of twenty thousand dollars and odd.

Q. That he had bought?

A. Yes, sir; I think he mentioned that he had bought it in connection with his brother; if I recollect right, there was something said about his brother; I don't know what it was.

Q. Do you know whether he really had any real estate at that time or had bought any?

A. Only from his conversation.

Q. When again did he speak of it?

A. I have heard him speak of it several times, perhaps three or four times.

Q. Fifteen or twenty years ago?

A. Yes, sir; about attending the sales at the Exchange, and talking about real estate up town.

Q. Large amounts?

A. Yes, large amounts for him; he was doing a small business. I supposed he was a man of small means; his purchases were small; his business was small.

Q. You never met him in a social way?

A. No, sir.

Q. Did you ever hear of his going off and leaving his store open?

130 A. No, sir.

Q. Going away and leaving the door open, with no one in charge?

A. No, sir.

Q. You heard very little about him, I suppose?
A. Only from this neighbor.

Redirect:

Q. He did buy that real estate, I suppose?
A. I don't know.
Q. You do not know that he did not?
A. No, sir.
Q. Don't you know that the records show that he did, and he has got it still?
A. I paid no attention to it.
Q. You had no idea he was a man of so much wealth?
A. No, sir.
Q. And this neighbor had not?
A. No, sir.
Q. He thought it was surprising?
A. I presume so, from the remark he made to me.

Recross:

Q. Had he any other property at that time, any further than his store, so far as you know?
A. No, sir.
Q. Have you seen him any during the last fifteen years?
A. I do not think I have seen him, to speak to him, during the last ten years.

JULIET BOSWORTH, called for proponent, sworn.

Redirect examination by Mr. Pierrepont:

Q. Tell me your name before marriage.
A. Juliet Dean.
Q. Are you a daughter of Mrs. Dean, that had business relations with Mr. Fox?
A. Yes, sir.
131 Q. Did you know about those business relations?
A. Yes, sir.
Q. Did you know Mr. Fox in his life-time?
A. Yes, sir.
Q. How often did you see him?
A. Since my brother's death I saw him more frequently; sometimes he would be up two or three times a month, and sometimes two or three times a week; sometimes he would be up once in two months.
Q. During what years were these visits?
A. Well, it is since May, 1868, that my mother had charge of the business my brother had.
Q. And between May, 1869, and the time of his death, how often did you see him?
A. Quite frequently; two or three times a month.
Q. Had he any agency before that for the husband?
(Counsel for contestants object to any testimony regarding matter that occurred since the making of the will. Question withdrawn.)
Q. Prior to 1864, where did you know him?
A. He came to the house, I think; I have been personally acquainted with him for the past eight years, I could say; I saw him come to the house, but of course I was not as well acquainted with him as I was afterwards.
Q. During that acquaintance had he business relations then?

A. Yes.
Q. What were they?
A. Business relations with my brother.
Q. And you saw him?
A. Yes, sir; I saw him.
Q. Did you see him often?
A. Yes, sir.
Q. Will you state what were his indications of intellect, as to his clearness and method?
132 A. I had no reason to doubt as to his clearness of mind. I think he was a man of more than ordinary ability; more than ordinary intellect.
Q. As to his soundness of mind?
A. I never had any reason to doubt it.
Q. And you have no doubt of his sanity?
A. No, sir; no doubt.
Q. No more than you have of any other person?
A. No, sir.

Cross-examined by Mr. Vanderpoel:

Q. I suppose you paid no particular attention to him before 1864?
A. He came to the house, of course, and I saw him more or less frequently.
Q. You paid no particular attention to him?
A. Just the same as I would to any acquaintance of the family; say, how do you do? Sometimes I was in the room during his business relations, and sometimes not.
Q. You had no business with him until 1868?
A. No, sir.
Q. You knew nothing of his family—his brothers?
A. No, sir. I knew he had a brother, and I have heard him speak of his wife and mother.
Q. How recent did you know he had a brother?
A. I heard him speak of his brother last winter.
Q. Did he speak kindly of him?
A. Yes, sir. He seemed to rather regret that there had been some trouble between them. The nature of that trouble I do not know. It was the only time I ever heard him speak of his brother.

ADONIJAH H. BROWN, called for proponents, sworn.

Direct examination by Mr. Pierrepont:

Q. How long did you know Mr. Fox prior to his death?
133 A. I think some twelve or fifteen years.
Q. During those years how often did you see him?
A. Well, it would be hard for me tell how often. I used to meet him frequently; he used to come in my store occasionally, and I would meet him in some of the neighbors' stores.
Q. Did you have any business relations with him, or know of his doing any business?
A. I don't remember that he was in any business when I first knew him.
Q. What did you hear him conversing about?
A. Well, the general topics of the day; a little on war topics and general things; sometimes on business matters.
Q. You were called by him as one of the witnesses to his will, I think?
A. Yes, sir.

Q. Where did he live prior to 1864?

A. He lived somewhere in our neighborhood, but I really don't know what street he did live in; it was close by somewhere; he lived in our neighborhood, in Thirteenth ward, I think.

Q. On these occasions when you saw him what did you see him about? Was it by accident or appointment?

A. More by accident. I never had any particular appointment.

Q. And these conversations on the war were such as you would have with any acquaintance?

A. Yes, sir.

Q. State how he was as to intellect.

A. I consider him perfectly sound.

Q. And as to clearness of mind?

A. I thought he was perfectly clear on every subject he conversed on.

Q. You saw nothing to indicate unsoundness?

A. No, sir.

Cross-examined by Mr. Vanderpoel:

Q. Did you hear him speak of his relatives?

134 A. Not particularly. He spoke, I think, of having a little difficulty with a brother. I might have heard him say something about that.

Q. Did you know that brother?

A. No, sir.

Q. When was it he spoke of having a difficulty with his brother?

A. I don't know when he had the difficulty. I think he spoke of it somewheres about the time the will was signed. i cannot give the precise date.

Q. Did he speak unkindly of him?

A. Not very. He seemed to be on rather bad terms with him.

Q. What did he say?

A. I could not tell.

Q. It was only an impression on your mind that there was some unfriendliness on his part towards his brother?

A. Yes, sir.

Q. Did you know where his brother lived?

A. No, sir.

Q. Did you ever go to see him, Charles Fox, socially?

A. Not particularly. I used to meet him very often in the stores around the neighborhood.

Q. Were you in the same business with him?

A. No, sir.

Q. Did you have any business relations with him?

A. No, sir; no buying or selling or trading. I might talk on business subjects sometimes.

Redirect:

Q. Did he tell you any cause of his unfriendly feelings towards his brother? Did he give you any reason for it or not?

A. I don't remember that he did. He never stated anything particular about it. I have a slight impression he spoke about it. I never asked him any particulars, that I remember.

135 Q. You did not ask him why he was unfriendly, and he did not tell you?

A. No, sir; I don't remember that I did.

Q. Does that remind you of anything connected with the war, his unfriendly feeling towards his brother?

A. I don't remember.

Recross:

Q. Did he speak of his brother enlisting and going off in Wilson's Zouaves?

A. Not to me.

Adjourned until Thursday, June 30th, 1870.

At a surrogate's court, held in and for the county of New York, at the surrogate's office, in the city of New York, on the twenty-fourth day of March, in the year one thousand eight hundred and seventy-one.

Present, Robert C. Hutchings, esq., surrogate.

IN THE MATTER OF THE PROBATE OF THE alleged last will and testament of Charles Fox, deceased.

The petition of the United States of America, by Edwards
136 Pierrepont, esq., United States district attorney for the southern district of New York, having been duly filed in this court on the 12th day of February, 1870, representing among other things that said petitioner was the sole legatee named in the last will and testament of Charles Fox, late of the county of New York, deceased, and that said deceased was, at or immediately previous to his death, an inhabitant of the county of New York, and departed this life in said county on the second day of February, 1870, leaving a last will and testament, relative to both real and personal estate; and said petition praying that said alleged last will and testament might be proved and letters testamentary granted thereon, according to law; and satisfactory proof having been made of the due service of the citation heretofore issued in this matter, requiring the proper parties to appear in this court on the twenty-sixth day of February, 1870, and attend the probate of the said last will and testament of said Charles Fox, deceased; and said petitioner, the United States of America, having appeared by said Edwards Pierrepont, esquire, United States district attorney for the southern district of New York, and by John M. Cooney, esq., as proctor and attorney, and by said Edwards Pierrepont, esq., as counsel, and O. H. Brummell, one of the persons named as one of the executors in said alleged will, having appeared by Pinckney and Spink, esqrs., as his attorneys and proctors, and David Hays, the other person named as an executor in said alleged will, having appeared by J. Solis Ritterband, esq., as his attorney and proctor in support of the proofs of said alleged will, and Benjamin N. Disbrow, the general guardian of Anne Fox, Joseph Fox, and George Fox, minors and heirs-at-law, being respectively niece and nephews, children of James Fox, a deceased brother of said Charles Fox, deceased, having appeared in person and by James Flynn, esq., as proctor and attorney of said general guardian, and by Jacob Hardenburgh, Aaron J. Vanderpoel, and Samuel Hand, esqs., as counsel
137 for said general guardian in opposition to the probate of said alleged will, and no other parties having appeared herein, and (besides other objections to admission to probate) under and by virtue of section 11, chapter 359, of the Laws of the State of New York, passed April 22d, 1870, the validity of the dispositions contained in said alleged will having been contested, and their construction and legal effect having been called in question in said proceedings of probate, by general guardian of said nephews and niece, being heirs-at-law and next of kin of said deceased, to wit, the questions of validity, construction, and legal effect hereinafter determined; and the said matter having been duly heard and adjourned from day to day until this day, and the said

alleged will and instrument in writing bearing date the 16th day of July, 1864, purporting to be the last will and testament of Charles Fox, deceased, having been produced, and the subscribing witnesses to the said instrument having been duly examined touching the facts and circumstances attending the execution thereof, and the competency of the said Charles Fox to execute the same as and for his last will and testament, and after hearing the proof and allegations of the respective parties, and the arguments of the respective counsel in respect thereof, and of the aforesaid questions of validity, construction, and legal effect, and due deliberation being thereon had:

It is now adjudged and decreed, and the surrogate of the county of New York, by virtue of the power and authority in him vested, doth adjudge and decree:

1st. That the instrument so propounded for probate is the last will and testament of said deceased, Charles Fox.

2d. That the said Charles Fox was, at the time of making and publishing the said instrument, of sound and disposing mind, memory, and understanding.

138 3d. That the said instrument was signed, witnessed, and in all respects executed by said Charles Fox as his last will and testament, according to the requirements of the statute in such case made and provided.

4th. That said last will and testament is inoperative, invalid, and void as a devise of real estate.

5. That said petitioner, the United States of America, is not entitled to and cannot lawfully take, receive, or hold as devise in trust or otherwise, under said last will and testament, the real estate devised thereby or any part thereof.

6th. That the real estate of the said Charles Fox, deceased, descends to his heirs-at-law.

7. That said petitioner, the United States of America, is the same artificial person or body politic and corporate described in said last will as "The Government of the United States at Washington, District of Columbia."

8th. That the said last will and testament is valid and operative as to the personal estate of the testator.

9. That as to the personal estate, the petitioner, the United States of America, is the sole legatee under said will after the payment of all lawful debts.

10. That no lawful trust as to real or personal estate is created by or vests under said will in the petitioner, the United States of America.

11th. That as to personalty, the bequest in said will to petitioner is not operative as a trust, but as an absolute gift. The terms of said bequest respecting the purpose thereof constituting no legal restriction upon the use of the legacy.

139 12th. The said instrument is admitted to probate as a will of personal estate only.

All questions of costs, expenses, and allowances in this matter are hereby reserved until the further order of this court.

ROBERT C. HUTCHINGS, *Surrogate.*

N. Y. supreme court, county of New York.

IN THE MATTER OF THE ALLEGED LAST WILL and testament of Charles Fox, deceased.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
ANNIE FOX, JOSEPH FOX, GEORGE FOX, BENJAMIN N. Disbrow, David Hays, and A. A. Brummell, respondents.

Please take notice that the appellant in the above-entitled matter appeals to the supreme court of the State of New York from the judgment order or decree of the surrogate of the county of New York in the
140 above-entitled matter, entered in the surrogate's court on the twenty-fourth day of March, 1871.

Dated April 14th, 1871.

JOHN M. COONEY,
Attorney for Appellant.

To JAMES FLYNN, Esq.,
Attorney for Benjamin Disbrow, Guardian for Annie Fox, Joseph Fox, and George Fox.

Know all men by these presents that we, Charles K. Graham and Willard Bullard, of the city of New York, are held and firmly bound unto the people of the State of New York in the sum of two hundred and fifty dollars, lawful money of the United States of America, to be paid to the said the People of the State of New York, or to the assigns thereof; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated the 14th day of November, one thousand eight hundred and seventy-one.

The conditions of the above obligations are such that if the United States of America shall diligently prosecute an appeal taken from a decree of the surrogate of the county of New York, entered on or about the 24th day of March, 1871, in a certain proceeding before the said surrogate in the matter of the probate of the last will and testament of Charles Fox, deceased, and shall pay such costs as may be based against the appellant, in the event of the appellant's failure to obtain a reversal of the decision so appealed from, then this obligation to be void; otherwise to remain in full force and virtue.

CHARLES K. GRAHAM. [L. S.]
WILLARD BULLARD. [L. S.]

Sealed and delivered in the presence of—
JOHN M. COONEY.

141 STATE OF NEW YORK,
City and County of New York, ss:

On this 14th day of November, one thousand eight hundred and seventy-one, personally appeared Charles K. Graham and Willard Bullard, to me known to be same individuals described in and who executed the foregoing bond, and severally acknowledged to me that they executed the same.

JOHN M. COONEY,
Notary Public, N. Y. County.

CITY AND COUNTY OF NEW YORK, *ss:*

Charles K. Graham, the within named, being duly sworn, doth depose and say that he resides at No. 207 East Thirty-fourth street, in said city, and is worth the sum of two hundred and fifty dollars over and above all his just debts, liabilites, and responsibilities, and property exempt from execution.

CHARLES K. GRAHAM.

Sworn to before me this 14th day of November, 1871.

JOHN M. COONEY,
Notary Public, N. Y. County.

CITY AND COUNTY OF NEW YORK, *ss:*

Willard Bullard, the within named, being duly sworn, doth depose and say that he resides at No. 319 West Thirty-first street, in said city, and is worth the sum of two hundred and fifty dollars over and above all his just debts, liabilities, and responsibilities, and property exempt from execution.

WILLARD BULLARD.

Sworn to before me this 14th day of November, 1871.

JOHN M. COONEY,
Notary Public, N. Y. County.

142 N. Y. supreme court, county of New York.

IN THE MATTER OF THE ALLEGED LAST WILL and testament of Charles Fox, deceased.

THE UNITED STATES OF AMERICA, APPELLANT, *vs.* ANNIE FOX, JOSEPH FOX, GEORGE FOX, Benjamin N. Disbrow, David Hays, and A. H. Brummell, respondents.

Please to take notice that the appellent in the above entitled action appeals to the supreme court of the State of New York from the judgment order or decree of the surrogate of the county of New York in the above-entitled matter, entered in the surrogate's court on the 24th day of March, 1871.

JOHN M. COONEY,
Attorney for Appellant, 117 *Nassau st., New York City.*

To JAMES FLYNN, Esq.
PINCKNEY & SPINK, Esq.,
J. SOLIS RITTERBAND, Esqs.,

143 N. Y. supreme court, county of New York.

IN THE MATTER OF THE ALLEGED LAST WILL and testament of Charles Fox, deceased.

THE UNITED STATES OF AMERICA, appellant, *vs.* ANNIE FOX, JOSEPH FOX, GEORGE FOX, Benjamin N. Disbrow, David Hays, and A. H. Brummell, respondents.

The petition of appeal of the United States of America, appellant in the foregoing-entitled cause, exhibiting this their appeal by John M.

Cooney, their attorney duly appointed, respectfully shows to this court:

That the said United States of America is the sole legatee named in the last will and testament of Charles Fox, late of the city of New York, deceased.

That the said Charles Fox, after having in due form of law made and published his last will and testament to pass real and personal estate, died at the city of New York, on the second day of February, in the year one thousand eight hundred and seventy, aged sixty-nine years and upwards, seized and possessed of and well-entitled unto a large real and personal estate, amounting in value to more than one hundred thousand dollars.

144 That after the death of said Charles Fox, and during the month of March, one thousand eight hundred and seventy, the appellant, by Edwards Pierrepont, then the United States district attorney for the southern district of New York, produced before the surrogate of the county of New York, and propounded to him for probate as a will of personal and real estate, a certain paper-writing purporting to be the last will and testament of the said Charles Fox, deceased, bearing date the sixteenth day of July, one thousand eight hundred and sixty-four.

That the appellant, your petitioner, by Edwards Pierrepont and John M. Cooney, as counsel, duly appeared before the said surrogate, and such proceedings were thereupon had before the said surrogate that the respondents Anne Fox, Joseph Fox, and George Fox, the next of kin of said Charles Fox, deceased, appeared by Benjamin N. Disbrow, their guardian, in person, before said surrogate, and contested the validity of said alleged will and its admission to proof or probate as aforesaid, and were the only contestants.

That the proceedings before said surrogate in the matter of proving the said alleged will were duly continued from time to time, and proof therein having been taken, and the allegations of the parties appearing having been heard, the said surrogate, on the twenty-fourth day of March, one thousand eight hundred and seventy-one, made and entered a decree, as said surrogate, in the matter aforesaid in substance as follows:

145 At a surrogate's court held in and for the county of New York, at the surrogate's office in the city of New York, on the twenty-fourth day of March, one thousand eight hundred and seventy-one.

Present, Robert C. Hutchings, esq., surrogate.

IN THE MATTER OF THE ALLEGED LAST WILL and testament of Charles Fox, deceased.

The petition of the United States of America, by Edwards Pierrepont, esquire, United States district attorney for the southern district of New York, having been duly filed in this court on the twelfth day of February, 1870, representing, among other things, that said petitioner was the sole legatee named in the last will and testament of Charles Fox, late of the county of New York, deceased, and that said deceased was, at or immediately previous to his death, an inhabitant of the county of New York, and departed this life in said county, on the second day of February, 1870, leaving a last will and testament relative to both real and personal estate, and said petitioner praying that said alleged last will and testament might be proved and letters testamentary granted thereon according to law, and satisfactory proof having been made of the due service of the citation heretofore issued in this matter,

requiring the proper parties to appear in this court on the twenty-sixth day of February, 1870, and attend the probate of the said alleged last will and testament of said Charles Fox, deceased.

And said petitioner, the United States of America, having
146 appeared by said Edwards Pierrepont, esq., United States district attorney for the southern district of New York, and by John M. Cooney, esq., as proctor and attorney, and by said Edwards Pierrepont, esq., as counsel, and A. H. Brummell, as one of the persons named as one of the executors in said alleged will, having appeared by Pinckney and Spink, esquires, as his attorneys and proctors, and David Hays, the other person named as an executor in his said alleged will, having appeared by J. Solis Ritterband, esq., as his attorney and proctor in support of the proof of said alleged will, and Benjamin N. Disbrow, the general guardian of Annie Fox, Joseph Fox, and George Fox, minors, and heirs at law, being respectively niece and nephews, children of James Fox, a deceased brother of said Charles Fox, deceased, having appeared in person and by James Flynn, esq., as proctor and attorney of said general guardian in opposition to the probate of said alleged will, and no other parties having appeared herein, and besides other objections to admission to probate under and by virtue of section II, chapter 359, of the laws of the State of New York, passed April 22d, 1870, the validity of the disposition contained in said alleged will having been contested and their construction and legal effect having been called in question in said proceedings of probate by said general guardian of said nephews and niece, being heirs at law and next of kin of said deceased, to wit, the questions of validity, construction, and legal effect hereinafter determined; and the said matter being duly heard and adjourned from day to day, and the said alleged will and instrument, bearing date the sixteenth day of July, 1864, purporting to be the last will and testament of Charles Fox, deceased, having been produced and the subscribing witnesses to the said instrument having been duly examined touching the facts and circumstances attending the execution thereof, and the competency of the said Charles Fox to execute the
same as and for his last will and testament, and after hear-
147 ing the proof and allegations of the respective parties, and the arguments of the respective counsel in respect thereof, and of the aforesaid questions of validity, construction, and legal effect, and due deliberation being therein had—

It is now adjudged and decreed that the surrogate of the county of New York, by virtue of the power and authority in him vested, doth adjudge and decree:

1st. That the instrument propounded for probate is the last will and testament of said deceased, Charles Fox.

2d. That the said Charles Fox was, at the time of making and publishing the said instrument, of sound and disposing mind and memory and understanding.

3d. That the said instrument was signed, witnessed, and in all respects executed by said Charles Fox as his last will and testament, according to the requirements of the statute in such case made and provided.

4th. That said last will and testament is inoperative and invalid and void as a devise of real estate.

5th. That said petitioner, the United States of America, is not entitled to and cannot lawfully take, receive, or hold as devisee, in trust or otherwise, under said last will and testament, the real estate devised thereby, or any part thereof.

6th. That the real estate of the said Charles Fox, deceased, descends to his heirs at law.

7th. That the said petitioner, the United States of America, is the same artificial person or body politic or corporate described in
148 said last will as the Government of the United States, at Washington, District of Columbia.

8th. That the said last will and testament is valid and operative as to the personal estate of the testator.

9th. That as to the personal estate, the petitioner, the United States of America, is the sole legatee under said will after the payment of all lawful debts.

10th. That no lawful trust as to real or personal estate is created by or vests under said will in the petitioner, the United States of America.

11th. That as to personalty, the bequest in said will to petitioner is not operative as a trust, but as an absolute gift, the terms of said bequest respective to the purpose thereof constituting no legal restriction upon the use of the legacy.

12th. That said instrument is admitted to probate as a will of personal estate only.

All questions of costs, expenses, and allowances in the matter are hereby reserved until the further order of this court.

(Signed) ROBERT C. HUTCHINGS,
Surrogate.

And your petitioner, the said appellant, complains and alleges that so much and such part of said decision, order, judgment, and decree in the words and figures following:

"That said last will and testament is inoperative and invalid and void as a devise of real estate;" and "That said petitioner, the United States of America, is not entitled to and cannot lawfully take, receive or hold as a devise, in trust or otherwise, under said last will and testament, the real estate devised thereby or any part thereof;" "That the real
149 estate of said Charles Fox descends to his heirs at law;" "That said instrument is admissible to probate as a will of personal estate only;"

Together are, and that each and every of them solely and separately is, erroneous, improper, and illegal, and that your petitioner, the said appellant, is injured and aggrieved thereby, and their right, title, and interest of, in, and to the real estate of the said Charles Fox, deceased, is in consequence thereof doubted, impaired, and injured, and they are thereby unjustly deprived of the free enjoyment of the same, and they have in consequence thereof duly appealed to this honorable court for a redress and determination of their rights in the premises.

And the appellant, your petitioner, prays that the several parts of said decision, order, judgment, and decree hereinbefore given, and each and every of them, may be reversed, set aside, and annulled by this honorable court, and that such proceedings may be had, and such issue or issues awarded in the premises, as to the Supreme Court shall seem just and proper for a *a* full and complete determination of the aforesaid rights of your petitioner.

And the appellant, your petitioner, further states that the persons intended to be made defendants, respondents, and parties to the said appeal, and who claim to be interested in the proceedings before the said surrogate, are as follows, to wit: Benjamin N. Disbrow, the general guardian, and Anne Fox, Joseph Fox, and George Fox, minors, and children of James Fox, deceased; David Hays and A. H. Brummell,

the executors named in the last will and testament of Charles Fox, deceased.

And the appellant, your petitioner, prays that the persons named and claiming as aforesaid, and every of them, may answer this petition of appeal, pursuant to law and the rules and practice of this court, and that the Supreme Court may appoint a day and place for the
150 hearing of the parties hereto upon said appeal, and that the appellant, your petitioner, may have such further or other relief in the premises as to the court shall seem just and equitable.

Dated New York, April 13th, 1871.

JOHN M. COONEY,
Attorney for Appellant.
EDWARDS PIERREPONT,
Of Counsel.

STATE OF NEW YORK,
City and County of New York, ss:

On this 13th day of April, 1871, before me personally appeared the above-named John M. Cooney, and made oath that he has read and subscribed the foregoing petition of appeal, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be on his information and belief, and as to those matters he believes it to be true.

JOHN M. COONEY.

Sworn to before me this 13th day of April, 1871.

EDWARD TIMPSON.
Commissioner of Deeds.

151 Supreme court, county of New York.

IN THE MATTER OF THE ALLEGED LAST WILL and testament of Charles Fox, deceased.

THE UNITED STATES OF AMERICA, APPELLANTS,
vs.
ANNE FOX, JOSEPH FOX, GEORGE FOX, BENJAMIN N. DISBROW, DAVID HAYS, and A. H. BRUMMELL, respondents.

The above-named respondents, Anne Fox, Joseph Fox, and George Fox, by Benjamin N. Disbrow, their (and each of their) guardian ad litem, for answer to the petition of appeal of The United States of America, appellants, respectfully show—

First. These respondents, by their said guardian ad litem, admit that a decree or order of the date, tenor, and effect in the said petition of appeal set forth, was made by the surrogate of the county of New York.

Second. These respondents, by their said guardian ad litem, say that each and every of those parts of said decree or order complained of by the said appellants as erroneous, improper, and illegal, were and
152 are not erroneous, improper, or illegal, but are in all respects just, lawful, and equitable.

Third. And further answering said petition of appeal, these respondents, by their said guardian ad litem, deny that the United States of America are the sole legatees named in the last will and testament of

Charles Fox, deceased, and deny that said Charles Fox, deceased, made or published a last will and testament to pass real or personal estate.

These respondents, therefore, by their said guardian ad litem, pray that those parts of the said order or decree of the said surrogate of the county of New York, complained of by the said appellants as erroneous, improper, and illegal, may be affirmed, and that said petition of appeal may be dismissed by this honorable court, with costs, and for such other and further relief in the premises as shall be agreeable to law and equity.

JAMES FLYNN,
Atty. for B. N. Disbrow, Guardian ad litem, No. 7 Warren St.

CITY AND COUNTY OF NEW YORK, *ss:*

Benjamin N. Disbrow, being duly sworn, deposes that he is the guardian ad litem of the above-named respondents, Anne Fox, Joseph Fox, and George Fox, minors, duly appointed by the court to defend the appeal herein; that he has read the foregoing answer, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters stated on information and belief, and as to those matters he believes it to be true.

BENJ. N. DISBROW.

Subscribed and sworn to before me this 30th day of November, 1871.
DANL. D. NOYES,
Notary Public, New York City.

153 New York supreme court, city and county of New York.

THE UNITED STATES OF AMERICA, APPELLANTS,
against
ANNIE FOX, JOSEPH FOX, GEORGE FOX, BENJAMIN N. Disbrow, and others, respondents.

Due and timely service admitted of notice of appeal, petition of appeal, and copy of return.

J. SOLIS RITTERBAND,
Atty. for Executors.
PINCKNEY & SPINK,
Attys. for Executors.
JAMES FLYNN,
Atty. for Guardian ad litem.

154 STATE OF NEW YORK,
City and County of New York, Surrogate's Office, ss:

I, Morgan A. Dayton, jr., clerk to the surrogate's court of the county of New York, do hereby certify and return to the supreme court of the State of New York, that the annexed are true and correct copies of each, every, and all proceedings, documents and papers now on file and of record in this office, in the matter of the probate of a paper propounded as the last will and testament of Charles Fox, deceased; that I have carefully compared the same with the originals thereof, now remaining in this office, and find the same to be a correct transcript therefrom, and of the whole of said originals.

In testimony whereof I have hereunto set my hand, and affixed the seal of office of said surrogate, this fifth day of January, in the year of our Lord one thousand eight hundred and seventy-two.

[SEAL.] MORGAN A. DAYTON,
Clerk to the Surrogate's Court.

[U. S. rev. stamp, 5 c.]

155 At a general term of the supreme court, held at the court-house in the city of New York, in and for the first judicial department, on the 14th day of June, A. D. 1872.

Present, Hon. D. P. Ingraham, presiding justice; W. H. Leonard and J. W. Gilbert, associate justices.

IN THE MATTER OF THE PROBATE OF A PAPER-writing propounded as the alleged last will and testament of Charles Fox, deceased.

THE UNITED STATES OF AMERICA, APPELLANTS,
vs.
ANNIE FOX, JOSEPH FOX, GEORGE FOX, BENJAMIN N. DISBROW, DAVID HAYS, and A. H. BRUMMELL, respondents.

The appeal by the United States of America from the decree of the surrogate of the county of New York, entered on the 24th day of March, 1871, in the matter of the probate of a paper-writing propounded as the last will and testament of Charles Fox, deceased, coming on to
156 be heard at the general term of the supreme court in and for the first judicial department, and after hearing Edwards Pierrepont, esq., of counsel for said appellant, the United States of America and James Flynn, of counsel for Benjamin N. Disbrow, guardian ad litem of the respondents, Annie Fox, Joseph Fox, and George Fox, it is now, on motion of James Flynn, attorney for Benjamin N. Disbrow, guardian ad litem of said respondents, Annie Fox, Joseph Fox, and George Fox, ordered and adjudged that the said decree of the surrogate of the county of New York, made and entered on the 24th day of March, 1871, mentioned in the appeal of the appellants, and in the petition of the appeal to this court, be, and the same is hereby, affirmed with costs.

(A copy.)

CHAS. E. LOEW, *Clerk.*

Supreme court, general term.

IN THE MATTER OF THE PROBATE OF PAPER-writing propounded as the last will, &c., of Charles Fox, deceased.

INGRAHAM, *P. J.*

Application was made to the surrogate to admit the will of Charles Fox to probate as a will of real estate.

157 The will contains a devise of the residue of the testator's estate, real and personal, to the Government of the United States, at Washington, District of Columbia, for the purpose of assisting to discharge the debt contracted by the war for the subjugation of the rebellious Confederate States.

The heirs at law contested the validity of this disposition of his property. The surrogate admitted the will to probate as a will of personal estate, but refused to admit it as a will of real estate, for the reason that the will was void as a will of real estate, and that the United States could not lawfully take, receive, or hold, as devisee, in trust or otherwise, under the said will, the real estate devised thereby.

From this decision the United States appeal to this court.

Two questions have been argued before us on this appeal:

1st. Whether the United States can take under this will the real estate so devised?

2d. Whether, if they cannot take real estate as devisee, the doctrine of equitable conversion should not be applied so as to require the executors to convert the real estate into personalty, for the purpose of carrying into effect the intentions of the testator?

Although there are other questions which we think might have been argued in this case, we do not purpose, in the disposition of it, to notice any except those which have been argued by the appellant as grounds for reversal of the surrogate's decree.

If this devise is to be considered as a trust in the United States, to apply the property devised for the specified purpose of assisting to pay the debt contracted by the war, it is clear, under the decisions of our courts, that no such trust is valid.

The land being in this State, the validity of the trust is to be decided according to the laws of this State, (Levy *vs.* Levy, 33 N. Y., 97,
158 136;) and, as was decided in that, the trust was not only invalid, but there was no competent trustee to take.

In this case the court below held that the devise to the United States was valid. This was reversed in the court of appeals, and the trust in them was held to be void.

Can the United States take, as devisee of real estate, to their own use? We are of the opinion that neither by the common law, nor under our statues regulating devises, can a devise to the United States be held valid.

That Government is neither a person capable of taking by devise, nor can the statute regulating devises be construed as extending this right to bodies politic or corporate, except when authorized by the laws of this State to take by devise.

This question arose incidentally in Burrill, examiner, vs. Boardman and others, in this court, and the right to take by devise was denied, and in that case, on appeal, (43 N. Y., 263,) the chief-justice expressed his doubts as to the power to take; but the same not being necessary to the decision of that case, no definite opinion was expressed thereon.

By the common law a devise of real estate was not permitted except for a particular use. The right to devise real estate rests in the statute. The statute of this State only allows devises to persons capable of holding, and corporations authorized by their charter to take by devise. As the appellants are not within either of these descriptions, they cannot take under our statutes. The remaining question is whether the doctrine of equitable conversion can be applied to this case so as to make it the duty of the executors to sell the real estate and convert it into personalty for the purpose of carrying out the intent of the testator.

In the case of White vs. Howard, 46 N. Y., 144, referred to in 4 La., 442, Judge Grover says: To constitute an equitable conversion of real into personal, it must be made the duty of, and obligatory upon, the trustees to sell in any event. A mere discretionary power of selling produces no such result.

159 Here there is not even a power of sale, and there is no case where this doctrine has ever been extended so as to give to executors power to sell when such power is not conferred by the will. When the purpose for which a sale is asked for has failed and the necessity ceased, there can be no authority for such conversion.

The doctrine of equitable conversion is based upon the principle that equity will require a thing to be done that ought to be done, but where

it is apparent that the thing sought to be obtained was contrary to law, there is no ground upon which that doctrine can be made applicable.

INGRAHAM, *C. J.*

Concurs—W. H. L.
J. W. G.

Notice of appeal.

Court of appeals, State of New York.

IN THE MATTER OF THE ALLEGED LAST WILL and testament of Charles Fox, deceased, the United States of America, appellant,
against
ANNIE FOX, JOSEPH FOX, GEORGE FOX, BENJAMIN N. DISBROW, DAVID HAYS, and A. H. BRUMMELL, respondents.

Please take notice that the appellant in the above-entitled mat-
160 ter hereby appeals to the court of appeals of the State of New York from the judgment of the supreme court of the State of New York entered on the 29th day of June, 1872, affirming the order or decree of the surrogate of the county of New York, in the above-entitled matter, entered in the surrogate's court on the 24th day of March, 1871.

Dated New York, July 19th, 1872.

JOHN M. COONEY,
Attorney for Appellant, 51 Chambers Street, N. Y. City.

STATE OF NEW YORK,
City and County of New York, ss :

I, Charles E. Loew, clerk of the supreme court in and for said county, do hereby certify that the foregoing consists of certified copies of the notice of appeal and judgment-roll on file in my office.

In witness whereof I have hereunto set my hand and affixed my official seal this 28th day of December, A. D. 1872.

CHARLES E. LOEW, *Clerk.*

161 At a special term of the supreme court, held at the court-house in the city of New York on the 3d day of June, 1873.

Present, Hon. E. L. Fancher, justice.

IN THE MATTER OF THE PROBATE OF A PAPER-writing propounded as the last will and testament of Charles Fox, deceased.

THE UNITED STATES OF AMERICA, APPELLANTS,
ag'st
ANNE FOX, JOSEPH FOX, GEORGE FOX, BENJAMIN N. DISBROW, DAVID HAYS, and A. H. BRUMMELL, respondents.

The United States of America having appealed to the court of appeals from the judgment of the general term of this court, entered
162 herein in the office of the clerk of the county of New York, on the

29th day of June, 1872, and said court of appeals having affirmed the judgment of the general term of this court with costs:

Now, on reading and filing the remittitur from the said court of appeals to this court, and on motion of James Flynn, attorney for Benjamin N. Disbrow, guardian ad litem of the above-named respondents, Anne Fox, Joseph Fox, & George Fox:

It is ordered that the judgment of the court of appeals be, and the same is hereby, made the judgment of this court.

Enter:

E. L. F.

163 (Indorsed:) Supreme Court. The United States of America, appel's, vs. Anne Fox, Joseph Fox, and George Fox & o'rs, resp. Order making judgment of court of appeals the judgment of this court. Jas. Flynn, atty. for guardian ad litem, No. 7 Warren st., New York. C. E. L.

164 Supreme court.

IN THE MATTER OF THE PROBATE OF A PAPER-writing, propounded as the last will and testament of Charles Fox, deceased.

THE UNITED STATES OF AMERICA, APPELLANTS, *ag'st* ANNE FOX, JOSEPH FOX, GEORGE FOX, BENJAMIN N. DISBROW, DAVID HAYS, and A. H. BRUMMELL, respondents.

The above-named appellants having heretofore appealed to this court from the decree of the surrogate of the county of New York, made and entered on the 24th day of March, 1871, in the matter of the probate of a paper-writing propounded as the last will and testament of Joseph Fox, deceased, and the respondents, Anne Fox, Joseph Fox, and George Fox, by Benjamin N. Disbrow, their guardian ad litem, having filed their answer to the petition of appeal, and the said appeal having been
165 heard at the general term of this court, held in June, 1872, and the discision of said general term having been duly rendered at said term, as appears by the order of said court, bearing date June 14 1872, and duly filed with the clerk of this court, whereby it appears that the said decree of the said surrogate of the county of New York was affirmed with costs:

Now, on motion of James Flynn, attorney for Benjamin N. Disbrow, guardian ad litem of the respondents Anne Fox and James Fox:

It is adjudged that the said decree of the said surrogate of the county of New York, made and entered on the 24th day of March, 1871, in the matter of the probate of a paper-writing propounded as the last will and testament of Charles Fox, deceased, be, and the same is hereby, affirmed, & that Benjamin N. Disbrow, guardian ad litem of the respondents Anne Fox, Joseph Fox, and George Fox, recover of the United States of America, appellants, the sum of one hundred & six $\frac{55}{100}$ dollars, his costs and disbursements on said appeal.

166 Filed June 29, 1872, 11 o'clock & 59 min's.

Judgment.—June 11, 1873.

Supreme court.

IN THE MATTER OF THE PROBATE OF A PAPER-writing, propounded as the last will and testament of Charles Fox, deceased.

THE UNITED STATES OF AMERICA, APPELLANTS, *ag'st* ANNE FOX, JOSEPH FOX, GEORGE FOX, BENJAMIN *Fox* N. Disbrow, David Hays, and A. H. Brummell, respondents.

The United States of America having taken an appeal in this action from the judgment of the general term of the first judicial department, entered herein on the 29th day of June, 1872, to the court of appeals, having been argued, and the said judgment having been affirmed with costs, and the remittitur from said court of appeals having been filed and an order duly entered, making the judgment of the court
167 of appeals the judgment of this court:

Now, on motion of James Flynn, attorney for the guardian ad litem of the respondents Anne Fox, Joseph Fox, and George Fox, minors:

It is ordered and adjudged that Benjamin N. Disbrow, as guardian ad litem of said minor respondents, recover of the United States of America, appellants, the sum of one hundred and forty-seven $\frac{08}{100}$ dollars, costs and disbursements upon appeal to said court of appeals, together with the sum of four thousand dollars awarded to said guardian ad litem by order of this court as an additional allowance to the usual costs, making together the sum of four thousand one hundred and forty-seven $\frac{08}{100}$ dollars, costs and disbursements, and that said guardian ad litem have execution therefor.

(Endorsed:) Filed June 11, 1873, 12 o'clock 2 min.

168 Court of appeals.

IN RE WILL OF CHARLES FOX, DEC'D.

ANDREWS, *J.*:

The right of the United States to acquire and hold lands within this State is incident to the execution of certain powers conferred upon Congress by the Constitution; has been exercised from the foundation of the Government. It has been sanctioned by practice, and it has not been questioned or denied.

It is essential that this right should inhere in the General Government.

The Constitution, among other powers, vests in Congress the power to regulate commerce, declare war, to levy and collect taxes, to establish post-offices, and to constitute inferior courts.

In executing these powers it may take and hold land for the erection of light-houses, forts, custom-houses, post-offices, and court-houses, and the State has been ready at all times to promote the interests
169 of the General Government, by assenting to the exercise by the latter of exclusive power of legislation over lands in this State, acquired for these purposes.

The mode in which Congress shall acquire the lands within a State required for public uses is not prescribed by the Constitution.

It may acquire title, doubtless, by voluntary conveyance of the owner, in any manner authorized by the law of the State in which the lands required are situated, or it may take them by the exertion of the power of eminent domain, upon making compensation to the owner. (Reddale vs. Bryan, 14 Md., 444; Story on Const., § 114; Cooley on Const. Law, 55.) But it does not follow from the concession that Congress may take lands within a State for necessary public uses, that the United States has power, under the Constitution, to take lands by devise. It was held by this court, in Ley vs. Levy, 33 N. Y., 99, that it had no power to take lands by devise in trust for a charity.

It is not necessary in this case to decide whether the United States could, with the consent of a State, accept a devise of lands made
170 to it directly and unaccompanied by any trust.

In view of the origin and nature of the power to devise lands, of the right of each sovereignty to determine the limitations under which this power shall be exercised, and of our statute upon the subject, the devise to the United States in the will in question cannot be sustained.

Statutes of wills are enabling acts. Prior to the statutes 32 Henry 8, c. 1, & 35 Henry 8, c. 8, there was in general no power at common law to devise lands. It was a part of the feudal policy that land could not be alienated without the consent of *of* the lord, and the power to devise lands was opposed to this policy. If permitted it would have deprived the lord of many *of many* of the incidents and profits of feudal tenure.

The statutes referred to were not restrictive of antecedent rights, but conferred a limited power to devise. They permitted all persons except feme coverts, infants, idiots, and persons of non-sane memory, having a sole estate in fee simple, *if* any manors, &c., to give, dispose, will, or devise to any person or persons, except bodies politic or corporate.

The English statute of wills became a part of the law of this State upon the adoption of the constitution of 1777. It was substantially re-enacted by statute passed in 1787 & in 1783; (1 Green Laws,
171 387; 1 R. S., 364;) and at the revision in 1850, the language was changed so as to provide that a testator may devise his lands to any person capable by law of holding real estate; but no devise to a corporation shall be valid unless such corporation be especially authorized by its charter or statute to take by devise. (2 Rev., 57, § 3.)

The validity of the devise to the United States in the will in question is to be tested by this statute. It is a settled principle of the common law, that the lex rei sitæ in respect to the modes of transfer of real property and the capacity to make and receive them and the validity of devises of land, is regulated and controlled by the local law, and the law of any other jurisdiction or sovereignty upon the subject in opposition to the law of the place is nugatory.

There can be no pretense that the States have surrendered to the General Government the control of this subject.

No such claim has been asserted, and jurisdiction over testamentary dispositions of land within a State by the General Government is in no way an essential or appropriate incident to the power to take lands for public uses.

172 The statute of wills authorize devises to be made to any person capable by law of holding real estate, and to such corporations as are especially authorized by their charters, or by statute, to take by devise.

It was held in White vs. Howard, 46 N. Y., 144, that corporations referred to in this statute are corporations created by and existing under the law of this State, and a devise to a foreign corporation of lands here was held to be void, although the corporation was authorized by its charter to take by devise.

It must be maintained, therefore, to sustain the devise in question, that the United States is a person, within the purview of the statute.

That the word person was not intended to designate natural persons only is evident from the prohibition as to devises to corporations, which is in the nature of an exception to the general power to devise to every person, given in the previous clause of the sentence.

This still more distinctly appeared in the former statute, which allowed a devise to be made to any person or persons, except bodies politic or corporate.

Corporations will, in general, be deemed included in legal enactments extending generally to persons. (Shaw I, in Cumings vs. Phœnix
173 Bank, 11 Met., 129; School Directors vs. Carlisle Bank, 8 Watts, 289; United States vs. Amesley, 11 Wheat., 393; Angell & Ayres on Corps., § 17.) They are artifical persons, bodies politic, possessing some of the attributes of natural persons, and deriving their existence and powers from the State, and are subject to many of the obligations and duties imposed by the law upon individuals. But no authority has been referred to, showing that the word person, when used in a statute, may, without further definition, be held to embrace a State or nation. Its meaning may be extended by express definition, so as to include a government or sovereignty.

An example of it may be found in our statute relating to crime, (2 Rev. St., 703, § 35,) which declares that when the word person is used in the chapter to designate the party whose property may be the subject of an offense, it shall be construed to include the United States, or any State government or county which may lawfully own any property within this State.

In construing a statute words are to be taken in their ordinary sense, unless from a consideration of the whole act it appears that a different meaning was intended.

The word person does not, in its ordinary or legal significance,
174 embrace a State or government, and there is no ground to justify such an extension of its meaning in construing the statutes relating to devises.

The gift in the will in question to the United States cannot be sustained as a devise of land, for the reason that the testamentary capacity given by the statute extends only to natural persons and such corporations as are authorized by the law of the State to take by devise.

The point urged by the United States, that there was by the will an equitable conversion of the land into personalty, and that the gift may be treated as a bequest of the proceeds which should arise from the sale of the lands, cannot be sustained. There was no constructive conversion of the realty.

The plain intention of the testator was to devise the lands as such, and that the United States should take it as a devise.

He used apt words to charge the lands devised with the payment of debts. The devise being after the payment of debts, was a charge of the debts upon the lands devised. Lupton vs. Lupton, 2 V. C. C., 614.

The lands were not charged in exoneration of the personalty;
175 and under our statute the lands devised would have been charged

in the hands of the devisees with the debts to the same extent, if no reference had been made to them in the will.

The only contingency in which a sale of the lands could become necessary for the purposes of the will would be in case the personal property should be insufficient to pay the debts of the testator.

It was wholly uncertain whether a sale for that purpose would be required. There was no direction in the will that the lands should be sold for the payment of the debts. No express power was given to the executors to sell them, nor under our system of administering the property of decedent for the payment of creditors can such a power be implied from the mere charge of debts upon lands descended or devised. In Jones vs. Hughes, 6 Exchr., 222, it was held by the unanimous judgment of the court of excheq'r chamber that there is no implied power in executors to sell lands which descend to heirs charged with the payment of debts; that the remedy of creditors was in equity. This decision was not followed by the master of the rolls in Robinson vs. Lambert, 17 Bea., 592, or by the lord justice in the same case on appeal, 5 DeG. & M. & G., 27.

Lord St. Leonards (Sug. on Vendors, 14 Eng. Ex.) speaks of
176 these latter decisions as contrary to the received opinions; and the law upon the point has since been settled by statute 22 & 23 Vict., C. 35.

The statute in this State has provided an ample remedy for creditors against the real estate of a deceased person, for the collection of their debts and the implication of a power of sale in executors from a simple charge of the debts upon the lands is unnecessary and ought not to be indulged.

But it is unnecessary to decide the question, as the mere power of sale, if it existed in the executor, would not work a constructive change of the property.

The duty to sell must be imperative; and where there is no out and out conversion, and lands are charged only with the payment of debt, they retain their character of realty until they are actually converted. 2 Law, 529; Story Eq., § 790, 1224; Bourne vs. Bourne, 2 Hall, 35; Stagg vs. Jackson, 1 Comstock, 206; Harris vs. Clark, 7 Wes., 206; Savage vs. Burnham, 17 N. Y., 561; Clark vs. Ridelle, 11 S. & R., 311.

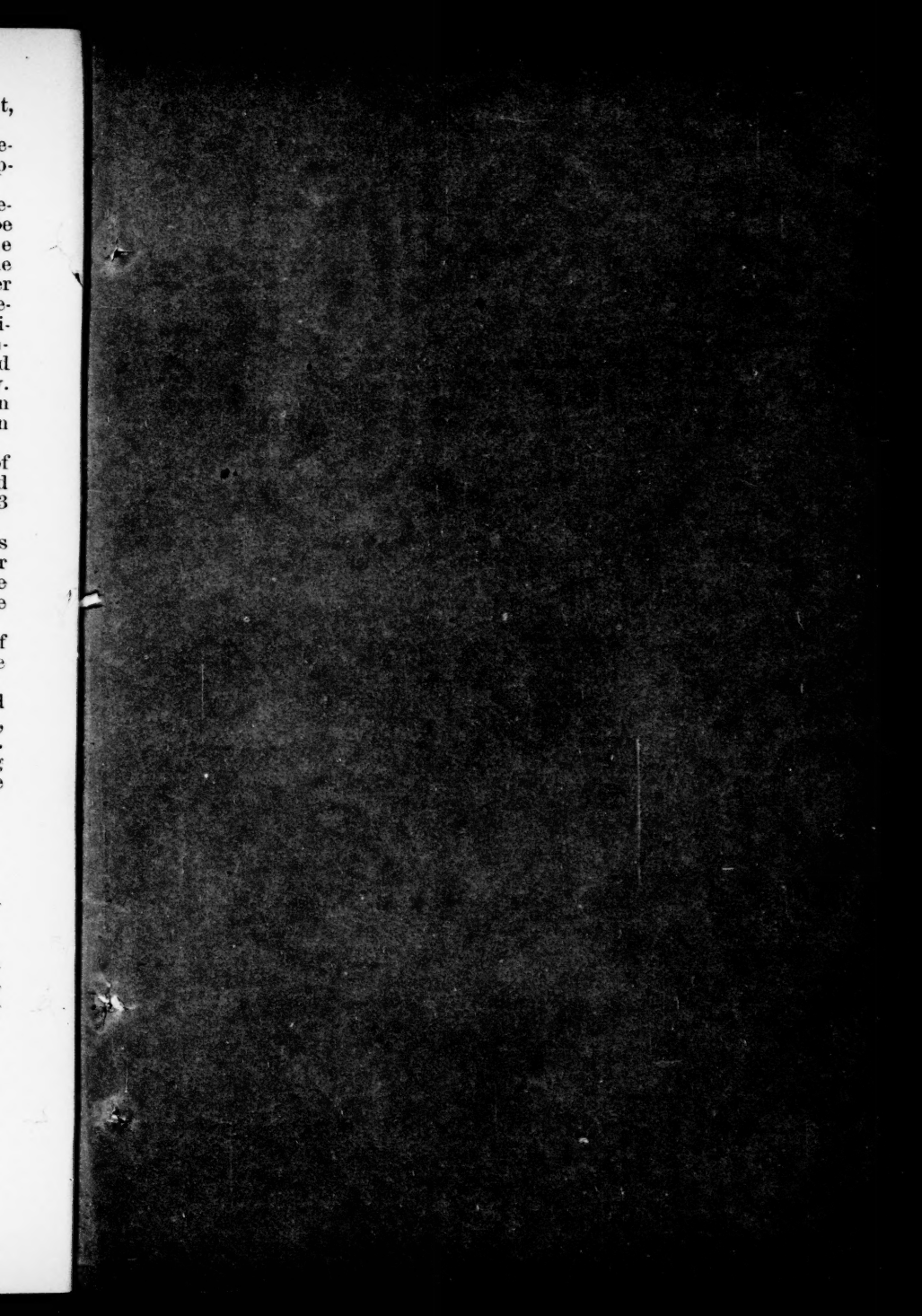
The judgment of the gen'l term should be affirmed.

ANDREWS, *J.*

All agree.

(Indorsed:) N. Y. court of appeals. In re: Will of Charles Fox. Opinion.

(Indorsement on cover:) No. 565. The United States, plaintiff in error, vs. Annie Fox, Joseph Fox, George Fox, Benjamin N. Disbrow, David Hays, A. H. Brummel. New York c't of appeals. Filed 8th October, 1874.



EVENING POST STEAM PRESSES, 41 Nassau Street, cor. Liberty.

Supreme Court of the United States.

THE UNITED STATES,
Plaintiffs in Error,

vs.

ANNIE FOX AND OTHERS,
Defendants in Error.

STATEMENT OF FACTS.

On the 16th day of July, 1864, Charles Fox, of the city of New York, made his last will and testament (fols. 17, 18), whereby he devised, or which purported to give or devise, to the Government of the United States, at Washington, certain real estate, situated in the city of New York and elsewhere, for the purpose of assisting to discharge the debt contracted by the war, and thereafter on the 2d day of February, 1870, the said testator died (fol. 16). The United States District Attorney for the ~~Northern~~ District of New York then applied by petition to the surrogate of the city and county of New York to admit the said will to probate (fol. 16).

The infant heirs of said Fox contested the will (fols. 21, 23).

The surrogate decided that the will was "inopera-"tive, invalid and void as a devise of real estate," and that the United States was not entitled to and could not lawfully "take, receive or hold, as devisee "in trust, or otherwise, under said last will and testa-"ment, the real estate devised thereby or any part "thereof." He also held and decided that the will was good as a will of personal estate, and that the United States was sole legatee, and could take the personal estate as such (fol. 138).

The United States appealed from that decision to the Supreme Court (fols. 139, 140, 142), where the said decree was affirmed (fols. 155, 156). The United States then appealed to the Court of Appeals of the State of New York (fols. 159, 160), where the judgment appealed from was affirmed (fols. 12, 13, 14), and the record was thereupon remitted to the Supreme Court to be enforced as the judgment of that court (fol. 14), and by order of the Supreme Court judgment was then entered in accordance with the decision of the Court of Appeals (fols. 161, 162, 163, 164, 165, 166, 167).

A writ of error to remove the cause to the Supreme Court of the United States for review was then applied for and granted on the grounds (fols. 1, 2, 3):

1. That there "was drawn in question the validity "of an authority exercised under the United States."

2. That there "was drawn in question the validity "of a statute of the State of New York as against the "United States, on the ground of its being repugnant "to the Constitution of the United States, and the de-"cision was in favor of its validity."

3. That there was "drawn in question the construc-"tion of the Constitution of the United States in res-"pect to its authorizing the said United States to take

"real estate devised to it, and the decision was against "the title to said real estate set up and claimed under "said Constitution."

And now the heirs of said testator, the defendants in error, apply to dismiss the appeal or writ or error, for want of jurisdiction, claiming that no such matters or rights were drawn in question, and that neither section 25 of the Judiciary Act, nor the Act of February 5, 1867, give to the plaintiff in error the right to have the judgment in this case taken to the Supreme Court of the United States for review.

POINTS.

I.

"The validity of an authority exercised under the "United States," was not drawn in question by the record or proceedings in that cause or proceeding.

As the plaintiff in error defines or explains it, he claims that the authority of the secretary of the treasury or other proper officer of the United States, to receive on behalf of the United States, the property real and personal, bequeathed and devised, was questioned, and that the decision was against the validity of such authority.

It does not appear from the record nor from any proceeding in the cause, that any such question was before the court, or that the court decided any such thing.

No authority had been or was being exercised under the United States, or by any officer of the United States. Nothing done by any such officer was held invalid.

The devise was of land situated in the State of New

York, and the will was made by a citizen of that State, in pursuance of the *statutes of that State*, and the court simply held that the United States of America was not entitled to and could not lawfully take the real property under *that will*, made in pursuance of the New York statutes, which did not authorize such a disposition by will or devise of real property within its limits.

The acts done were done by the testator and the surrogate, and the only authority exercised was so exercised under the statutes of the State of New York.

There are many cases where the validity of acts done by officers, agents or employes of the general government are drawn in question in State courts, and the words in the Judiciary Act and the Act of 1867. "*Authority exercised under the United States*" has reference to such cases; but it would be a forced and extraordinary construction of the act to hold it to extend to a case where no authority has been exercised under the United States, where no act done by any officer, agent or other person, has been done under the direction of, or in pursuance of any law of the United States, and where no such act or proceeding has been held invalid.

The act of Congress does not purport to nor was it ever intended to apply to any such case.

This court has uniformly held that to entitle a party defeated in a State court to bring his case to this court for review, by writ of error, the case must be brought *clearly* and indisputably within the provisions of the Act of Congress.

Ocean Ins. Co. *vs.* Polleys, 13 Peters, 157, 164.

Commercial Bank of Cincinnati, *vs.* Buckingham's Exrs., 5 How., 317, 341, 342.

See also other cases cited in the following 3d Point.)

Even if the question had been raised, and the court

had held that the secretary of the treasury, or other officer of the United States, could not or had not authority to receive the property devised by that will, that would not have been drawing in question the validity of an authority exercised under the United States, for these among other reasons:

1. No authority has or had been exercised. The statute does not provide for the case of an act not yet done, and which may never be done, or for the case of a decision that an authority cannot be lawfully exercised, which has never been, and may never be exercised or attempted.

2. The question could not arise in this case in any form. The secretary of the treasury and other officers are but agents of the government. They are not the government. Their authory to receive and hold property belonging to the government, or to do any other act for the government, is simply their commission or power of attorney, and a question of the sufficiency of that cannot, or at least has not, in any form, come in question in this case. The question is a question of *title* of their principal, and not of the sufficiency of the power or authority given to them to act for their principal.

   When the question of title is established in their principal, and these officers or agents in the exercise of the power conferred on them, deal with or dispose of the property, or bring actions to recover it, a question as to the validity of an authority exercised by them, may be brought in question, but not before.

   It cannot be necessary to consider this question further. The writ cannot be sustained, because of this assignment or ground of error.

II.

Neither is the second ground or assignment of error warranted by any facts in the case.

There was not drawn in question the *validity* of any statute of the State of New York, nor was any statute of the State held or claimed to be repugnant to the Constitution of the United States. The United States did not claim the property under or because it was given by the Constitution of the United States, nor was the will or devise based upon, authorized or regulated by the Constitution of the United States.

The right to dispose of land by will or devise, and the validity of the devise are regulated and governed solely by State laws.

White *vs.* Howard, 46 N. Y., 144.
Levy *vs.* Levy, 33 N. Y., 136.
United States *vs.* Crosby, 7 Cranch., 115.
McCormick *vs.* Sullivant, 10 Wheaton, 71.

A statute of the State of New York authorized the disposition of real property within the State, under certain restrictions, and the only right the testator in this case had to dispose of his property by will or devise was given by that statute, as by the common law he had no such rights (see the opinion in this case at fols. 158, 170).

The testator in thus attempting to dispose of his property devised it to the "United States of America," in trust, and the question arising on that will was not whether the statute was *valid* or not, but whether the statute authorized such a disposition of his property or whether it authorized him to make such a will. It was a question, as to the meaning and effect of the statute, purely a question of *construction*.

Commercial Bank of Cincinnati *vs.* Buckingham's Exrs., 5 How., 317, 341, 342.

The United States did not claim that the statute was

invalid, but only that the statute *as it reads* authorized the testator to devise his land to the United States and to make the United States a trustee for its own creditors. The United States was the petitioner offering the will for probate, and was not in a situation to question the validity of the statute, as questioning that would be questioning the validity of the will itself. Suppose on the appeal the United States had claimed and the court had held that the statute was void, the will would have fallen with it. It will thus be seen that the statute was not claimed on the part of the United States to be invalid, and if the validity of the statute had been in question and had been held valid it would not have been a decision against the United States, but on that question would have been in its favor.

Again, it is claimed by the plaintiff in error that the validity of the statute was in question and held valid against the right of United States, but that it was held valid on the ground that it was *repugnant* to the Constitution.

To be *repugnant* to the Constitution it must be *contrary to* or *opposed to* the Constitution. It must deny to the United States a right which the Constitution gives, and which the United States could exercise, if the statute was not in existence.

Does the United States Constitution provide for the disposition of land in the several States by will or devise?

Are not those State rights governed by and depending on State laws?

Does the Constitution restrict the right of a State to provide for and regulate the disposition of property, within its limits, by will or devise? The law on this subject is too well settled and too well known to leave it a debatable question.

There is nothing in the Constitution on the subject, and nothing there for that statute to be repugnant to. It might as well be claimed that a statute of any foreign country, regulating the disposition of its real

estate, by will or devise, is repugnant to the Constitution of the United States. There was never such a question in this case.

In the assignment of errors (fol. 8), it is claimed or alleged, *not that the statute is invalid*, but that as *construed by the courts*, it was drawn in question, and that the decision was in favor of its validity *as construed*.

Can there be a more complete *felo de se* than this?

Is there not here an admission that it was a question of the *construction* or *meaning* of a statute, and not a question of its validity?

And, that being so (assuming that there was even a question of construction before the court), the writ must be dismissed for want of jurisdiction, as was done in the case of the Commercial Bank of Cincinatti *vs.* Buckingham's executors, before cited, 5 How., 241, 242.

III.

The other ground or assignment of error has still to support it. It is there alleged that the construction of the Constitution was drawn in question, in respect to its authorizing the United States to take real estate devised to it.

What clause of the Constitution was drawn in question? The plaintiff in error does not point out any, nor does the record show any.

The Act of 1867, which, it is supposed, was intended to supersede the provisions of sec. 25 of the Judiciary Act, does not provide for assigning such a ground of error. But, assuming the provisions of sec. 25 of the Judiciary Act to be still in force, there are these reasons why that ground of error is not good, or sufficient to give this court jurisdiction to review the judgment in this cause by writ of error.

1. The writ and assignment of error should show what clause of the Constitution has been construed or drawn in question, or at least the *record* should.

Gibson *vs.* Chauteau, 8 Wallace, 314.
Railroad Co. *vs.* Rock, 4 Wallace, 177.
Suydam *vs.* Williamson, 20 How., 427.
Christ's Church *vs.* Co. of Philadelphia, 20 How., 26.
Taylor *vs.* Morton, 2 Black, 481.
Bridge Proprietors *vs.* Hoboken Co., 1 Wallace, 116.

It is not sufficient even that such a question might have been raised, or even that such a question was argued, but the *record must show* that the question was in fact *raised* and *necessarily* decided.

The Ocean Ins. Co. *vs.* William Polleys, 13 Peters, 157.
Crawford *vs.* Branch Bank of Mobile, 7 How., 279.
Mills *et al. vs.* Brown *et al.*, 16 Peters, 525.
Commercial Bank of Cincinnati *vs.* Buckingham, 5 How., 341.

How or where does it appear in the record in this case that any clause of the Constitution was in question or construed?

It is said in the assignment of errors that the construction of the Constitution was drawn in question "in respect to its authorizing the said United "States to take real estate devised to them" (fol. 8).

An examination of the record will show not only that the construction of the Constitution was not thus drawn in question, but that no such question was decided.

The decision of the surrogate (fol. 138), which

was affirmed, was, that the United States could not take the real estate devised by *that will*, and that as a devise of real estate *that will* was void. It was not decided that the United States could not take real estate devised to them, or that the United States could not be a devisee, but simply that the statutes of the State of New York did not authorize a devise of land situated in that State to the United States of America, or, as expressed in the will, "to the Government of the United States "at Washington." That is what the surrogate decided, and all that the record shows.

Looking further at the opinions of the courts on appeal, which however are no part of the record (51 N. Y. Rep., 355; 36 N. Y. Rep. 316; 13 Peters, 164, 165), it will be seen that both the appellate courts were of the opinion that, under the common law, or under the New York Statutes, the United States could not, as devisee, take the land, not that the Constitution of the United States did, or did not, authorize it.

Justice Andrews, in delivering the opinion of the Court of Appeals in the case (fols. 169, 170), says: "It is not necessary in this case to decide "whether the United States could, with the con- "sent of a State, accept a devise of lands made to "it directly and unaccompanied by any trust. In "view of the origin and nature of the power to "devise lands, of the right of each sovereignty to "determine the limitations under which this "power shall be exercised, and of any statute "upon the subject, the devise to the United "States in the will in question cannot be sus- "tained."

See also 52 N. Y., 533.

It must be apparent, without further argument, that there was *not* "drawn in question the construction of the Constitution of the United

States," and that the jurisdiction of this court cannot be invoked or retained because of that or any such question in this case.

Nor is it true, as averred or set forth in the writ of error, that "the decision was against the "title to said real estate, set up and claimed *under* "*the Constitution*." No title was set up or claimed under the *Constitution*. The title was set up and claimed under the *Statutes of the State of New York* and the will.

But this has been sufficiently stated and argued in this and the preceding points.

There is no ground on which this writ of error can be sustained, and it should be dismissed.

JAMES FLYNN,
Attorney and Counsel for Defendants in Error.

In the Supreme Court of the United States,

OCTOBER TERM, 1874.

THE UNITED STATES, PLAINTIFFS IN ERROR,
vs.
ANNIE FOX AND OTHERS, HEIRS-AT-LAW OF CHARLES FOX, DEFENDANTS IN ERROR. } No. 565.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

Brief submitted by the United States in opposition to the motion to dismiss the case for want of jurisdiction.

In the Supreme Court of the United States.

OCTOBER TERM, 1874.

THE UNITED STATES, plaintiffs in error,
vs.
ANNIE FOX AND OTHERS, heirs at law of Charles Fox, defendants in error.

No. 565.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

Brief submitted by the United States in opposition to the motion to dismiss the case for want of jurisdiction.

STATEMENT.

Charles Fox, of the city of New York, by his will, dated the 16th of July, 1864, devised and bequeathed (after payment of debts) all the residue of his property, real and personal, (including sundry parcels of land situated in the State of New York,) "*to the Government of the United States at Washington, District of Columbia, for the purpose of assisting to discharge the debt contracted by the war for the subjugation of the rebellious Confederate States.*" (Rec., pp. 5, 6.)

The surrogate for the county of New York, upon the will being propounded for probate, decreed:

"That the said last will and testament is inoperative and invalid and void as a devise of real estate.

"That said petitioner, the United States of America, is not entitled to and cannot lawfully take, receive, or hold as devisee, in trust or otherwise, under said will and testament, the real estate devised thereby or any part thereof.

"That the real estate of the said Charles Fox, deceased, descends to his heirs at law.

"That the said petitioner, the United States of America, is the same artificial person or body politic or corporate described in said last will and testament as the Government of the United States, at Washington, District of Columbia.

"That the said last will and testament is valid and operative as to the personal estate of the testator.

"That as to the personal estate, the petitioner, the United States of America, is the sole legatee under said will, after the payment of all lawful debts.

"That no lawful trust as to real or personal estate is created by or vests under said will in the petitioner, the United States of America.

"That as to personalty, the bequest in said will to petitioner is not operative as a trust, but as an absolute gift, the terms of said bequest respective to the purpose thereof constituting no legal restriction upon the use of the legacy.

"That said instrument is admitted to probate as a will of personal estate only." (Rec., p. 73.)

From this decree the United States appealed to the supreme court of the State, which affirmed the same,

(Rec., p. 81. *In re* will of Fox, 63 Barb., 158,) and from thence to the court of appeals, which again affirmed the decree, (Rec., p. 85. *In re* will of Fox, 52 N. Y., 530.) The opinions of the supreme court and court of appeals are printed in the record, pp. 81, 85.

The United States thereupon sued out a writ of error to this court, which the defendants in error move to dismiss.

ARGUMENT.

"A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, * * * * * * where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court on writ of error." Rev. Sts., § 709, p. 132; 1 Sts. at Large, 85; 14 Ibid., 386.

The question now before the court is, whether it has jurisdiction to re-examine this case. The writ of error cannot be dismissed, because the court may have a very clear conviction that the decision below was correct.

Pennywit *v.* Eaton, 15 Wall., 380.

It is submitted that among the prerogative powers enjoyed by the United States Government, under the Constitution, as necessarily inherent in its sovereign character and essential to the proper exercise of its sovereign functions, is that of acquiring property for public purposes in every part of the country, by all the usual

methods known to the law; and that this power extends to real property as well as to personal, and to taking by devise as well as by ordinary conveyance. Indeed, it is difficult to see any distinction in respect of this between real and personal property and between devises and conveyances. If a State can forbid the Government from taking real estate by devise, it may forbid its taking by grant.

The case is analogous to those where the inherent right of the General Government has been discussed and sustained to take bonds and other securities known to the law, and to enforce the same, though it has not been authorized to do so by any act of Congress.

Dugan *vs.* United States, 3 Wheat., 172.
United States *vs.* Tingey, 5 Pet., 127, 128.
United States *vs.* Bradley, 10 Pet., 359, 360.
United States *vs.* Linn, 15 Pet., 316, 317.
United States *vs.* Hodson, 10 Wall., 407.

It is contended on the other side that no question respecting the powers of the General Government was involved in this case or raised by the record, but that it only involved the validity of Fox's will under the laws of New York. The surrogate, whose decree was affirmed, decreed that the instrument propounded was the last will and testament of Fox, and, in respect of the personal estate, he admitted it to probate as such, but decreed that it was inoperative and void as to the real estate, because the United States "is not entitled to and cannot lawfully take, receive, or hold as devisee in trust or otherwise, under said last will and testament, the real estate devised thereby or any part thereof." (Rec., p. 73.) And the record, as well as the decisions in the New

York courts, show that the reason for holding that the United States could not take the real property under this will was that they were not within, that is, were excluded from the New York statute of devises, broad as its language is.

Nor is the jurisdiction of this court ousted because the case involves questions of the local law of New York or the construction of the statute of wills of that State. This was early decided in the case of Smith *vs.* Maryland, 6 Cranch, 286, where the court held that the construction of the treaty of peace with Great Britain was drawn in question when the inquiry was whether, under the laws of a State, such a title existed as the treaty protected, although the only difficulty of that inquiry consisted in the interpretation of the State laws and their application to the case.

This principle is well illustrated by the history of the great Fairfax case. There, in deciding whether the title of Lord Fairfax's devisee was protected by the treaty of 1794, the court decided that, under the statute of devises of Virginia, an alien might take lands and hold them until office found; that certain proceedings in Virginia did not take the place of an inquest of office or vest the land in the Commonwealth; and having thus established the character of the title under the laws of Virginia, it held that it was an estate protected by the treaty.

Hunter's Lessee *vs.* Fairfax, 1 Munf., 218; S. C., *nom.*, Fairfax *vs.* Hunter, 7 Cranch, 603; S. C., *nom.*, Martin *vs.* Hunter, 1 Wheat., 304.

In delivering the judgment of this court in 1 Wheat., at p. 357, Mr. Justice Story says: "The objection urged at the bar is that this court cannot inquire into the

title, but simply into the correctness of the construction put upon the treaty by the court of appeals, and that their judgment is not re-examinable here, unless it appears on the face of the record that some construction was put upon the treaty. If, therefore, that court might have decided the case upon the invalidity of the title, (and *non constat* that they did not,) independent of the treaty, there is an end of the appellate jurisdiction of this court. * * * * If this be the true construction of the section, it will be wholly inadequate for the purposes which it professes to have in view, and may be evaded at pleasure. But we see no reason for adopting this narrow construction; and there are the strongest reasons against it, founded upon the words as well as the intent of the legislature. What is the case for which the body of the section provides a remedy by writ of error? The answer must be, in the words of the section, a suit where is drawn in question the construction of a treaty, and the decision is against the title set up by the party. It is, therefore, the decision against the title set up with reference to the treaty and not the mere abstract construction of the treaty itself upon which the statute intends to found the appellate jurisdiction. How, indeed, can it be possible to decide whether a title be within the protection of a treaty until it is ascertained what that title is, and whether it has a legal validity?"

Nor does this court treat the construction put by the State courts upon their constitution and laws as conclusive, when the question involved is whether these conflict with the Federal Constitution. This is fully shown by cases brought to this court from State courts under the 25th section of the original judiciary act, on the

ground that the State had passed a law impairing the obligation of a contract. In Ohio Life Ins. and Trust Co. *vs.* Debolt, 16 How., 432, 433, Chief Justice Taney says: "It has been contended in behalf of the defendant in error, that the construction given to these acts of assembly by the State courts ought to be regarded as conclusive. It is said that they are laws of the State, and that this court always follows the construction given by the State courts to their own constitution and laws. But this rule of interpretation is confined to ordinary acts of legislation, and does not extend to the contracts of the State, although they should be in the form of a law; for it would be impossible for this court to exercise any appellate power in a case of this kind, unless it was at liberty to interpret for itself the instrument relied on as the contract between the parties."

In the application of this principle in the recent case of Gelpcke *vs.* Dubuque, 1 Wall., 216, Mr. Justice Miller, who dissented from the rest of the court, fully admitted the principle itself, and said: "It was urged that the very judgments of the supreme court of Ohio, which were then under review, [in Ohio Life Ins. and Trust Co. *vs.* Debolt, *supra*,] being the construction placed by the courts of that State on their own statutes and constitution, should be held to govern the Supreme Court of the Union, in the exercise of its acknowledged right of revising the decision of the State court in that class of cases. It requires but a bare statement of the proposition to show that, if admitted, the jurisdiction of the Federal Supreme Court to sit as a revisory tribunal over the State courts, in cases where the State law is supposed to impair the obligation of a contract, would be the merest sham."

The power to devise lands was fully established before the Constitution was adopted, and indeed before this country was colonized, and was then universally adopted here. (See 4 Kent Com., 504, 505.) It is immaterial that it owes its existence to the Statutes of Wills, enacted in the reign of Henry the Eighth. It was as universally recognized a mode of acquiring land as a grant from a living person was. Both are parts of the local law of the several States. And as was said before, if the courts of the several States can defeat a devise to the United States by deciding that the United States are not within their Statute of Wills, they can further rule that, under the laws of the State, the United States cannot take by conveyance or hold lands without permission of the State Government. An examination of the statutes of New York shows this. The Revised Statutes of that State, part 2, chap. 1, tit. 1, § 8, enacts that "every citizen of the United States is capable of holding lands within this State, and of taking the same by descent, devise, or purchase." Chap. 6, tit. 1, § 2, providing for wills of real estate, enacts that "every estate and interest in real estate descendible to heirs, may be so devised." Then § 3 enacts that "such devise may be made to every person capable by law of holding real estate; but no devise to a corporation shall be valid, unless such corporation be expressly authorized by its charter or by statute to take by devise."

2 Rev. Sts. of New York, (4th ed.,) 126, 241.

Mr. Justice Andrews, in delivering the judgment of the Court of Appeals in this case, says, very truly, that the word "person" is broad enough to include corporations; "otherwise, the prohibition against devises to

corporations, not authorized by their charters or by statute to take by devise, would have been unnecessary."

In re Will of Fox, 52 N. Y., 535.

As a rule all persons can take by devise who can take by grant.

Com. Dig. Devise, I.

Perk., § 505.

Vidal *v.* Girard, 2 How., 186, 187.

It has been held in New York, however, that a foreign corporation cannot take by devise under this statute.

White *vs.* Howard, 46 N. Y., 144.

And it would seem to follow that, as every person capable of holding lands can take by devise, since the United States cannot take by devise, they cannot hold lands within the State without the permission of the State government.

Whether a foreign government or foreign corporation shall take and hold lands within a State, is undoubtedly a matter of comity and not of right. But in New York the United States is neither a foreign government nor a foreign corporation. They are the sovereign within the State for all the purposes for which the Federal Government was established, as much as the State government is for its purposes, and as such sovereign, possess the essential sovereign attributes and prerogatives, and can exercise these as well within the limits of a State as in the District of Columbia. "The United States," says Mr. Justice Bradley, "is not only a Government, but it is a National Government, and the only government in this country that has the character of nationality. * * * * Such being the character of the General Govern-

ment, it seems to be a self-evident proposition that it is invested with all those inherent and implied powers which at the time of adopting the Constitution were generally considered to belong to every government as such, and as being essential to the exercise of its functions."

Legal Tender cases, 12 Wall., 555, 556.

See, also, Cotton *v.* United States, 11 How., 231.

Certainly among the powers which, at the time of the adoption of the Constitution, were considered as inherent in a sovereign, was that of taking and holding, by all usual methods, lands and personal property, within his own territory, for the purposes of government. It never seems to have been doubted that the King could take by devise. Would a devise of land to him for a custom-house, a soldiers' or seamen's hospital, or a similar purpose, have been held void in 1776? If so, it would have been solely by operation of the statutes of mortmain, which can hardly bind him, and which never extended to the colonies.

Perin *vs.* Carey, 24 How., 465.

Whicker *vs.* Hume, 7 H. L. Cas., 124.

In a recent case, Mr. Justice Strong thus broadly states the doctrine as to the inherent prerogative rights of the Federal Government: "It is a familiar principle that the King is not bound by any act of Parliament unless he be named therein by special and particular words. The most general words that can be devised, (for example, any person or persons, bodies politic or corporate,) affect not him in the least, if they may tend to restrain or diminish any of his rights and interests. He may even take the benefit of any particular act, though not

named. The rule thus settled respecting the British Crown is equally applicable to this Government, and it has been applied frequently in the different States, and practically in the Federal courts. It may be considered as settled that so much of the royal prerogatives as belonged to the King in his capacity of *parens patriæ*, or universal trustee, enters as much into our political state as it does into the principles of the British constitution."

Savings Bank *vs.* United States, 19 Wall., 239.

The doctrine as to statutes, above referred to, with its limitations, is well stated in Chitty on Prerogative, 382–384, and is recognized and established in New York in favor of the State.

People *vs.* Gilbert, 18 Johns., 227.

People *vs.* Rosseter, 4 Cow., 143.

It applies as well to the statutes of the several States as to those of the United States.

United States *vs.* Hoar, 2 Mason, 311.

The counsel for the Government submit that under the principle laid down in Savings Bank *vs.* United States, the United States, even if not named in the Statute of Wills of New York, can take advantage of it and receive a devise of land.

The cases cited by the counsel for the defendants in error, from the reports of this court, are distinguishable from this. In United States *vs.* Crosby, 7 Cranch, 115, the United States claimed land in Massachusetts under conveyance from a man whose only title thereto was derived from an instrument not under seal, while the Statutes of Massachusetts required a deed or convey-

ance under the hand and seal of the party to convey an estate of freehold in land. The instrument was executed in the Island of Grenada, in the West Indies, according to the method prescribed by the laws of that colony for conveying land. The court said that the *lex reisitae*, and not the *lex loci contractus*, governed the case, and that the instrument conveyed no title. The case would be analogous to this if the United States claimed this land under a will executed in a foreign country, according to the laws thereof, and not according to the laws of New York. And this was the point decided in McCormick *vs.* Sullivant, 10 Wheat., 192, which the defendants in error also rely upon.

The question of jurisdiction involves to so large an extent a consideration of the merits of the case that it has been found necessary to discuss the latter to some extent. But it is believed that enough has been said to show that the case presents not only a Federal question, but a very grave Federal question, for the consideration of the court, and that the court therefore has jurisdiction to re-examine it.

The question is not raised in the present record, whether, if the United States did take the lands devised, the devise is coupled with a trust. The surrogate decreed that as to the personalty the trust was void, and the United States took the property as absolute owner; and this part of his decree was not appealed from. There would seem to be no reason why the United States cannot be the trustee of a public charity, as in the case of the Smithsonian Institution.

1 Perry on Trusts, §§ 40, 41.

President of the United States *vs.* Drummond, cited in 7 H. L. Cas., 141, 155.
See also Tyler *vs.* Hand, 7 How., 573.

The contrary decision in Levy *vs.* Levy, 33 N. Y., 97, is only that of a majority of the court, and was not appealed from; and the reasoning, to say the least, is not very satisfactory.

This devise was undoubtedly a good charitable trust.
Newland *vs.* Attorney-General, 3 Meriv., 683.
Nightingale *vs.* Goulburn, 5 Hare, 484, s. c. 2 Phil., 594.
Ashton *vs.* Lord Langdale, 4 De Gex & Sm., 402.
Coggshall *vs.* Pelton, 7 Johns. Ch., 292.
Cresson's Appeal, 30 Penn. St., 437.
Perin *vs.* Carey, 24 How., 506.
2 Perry on Trusts, §§ 697, 704, 705, and cases cited.

And would formerly have been sustained in New York as a valid public charity.
Coggshall *vs.* Pelton, 7 Johns. Ch., 292.
Potter *vs.* Chapin, 6 Paige, 639.
Williams *vs.* Williams, 4 Seld., 525.
Inglis *vs.* Sailor's Snug Harbor, 3 Pet., 112.
2 Kent Com., 285, 286, and note; 4 Ibid., 507, 508.

The recent decisions in New York seem to have completely upset the law as it was previously understood; but even now, if the devisee is capable of taking as trustee, it would seem that the trust in this case might be sustained. The New York decisions are carefully reviewed in 2 Perry on Trusts, (2d ed.,) pp. 377–379.

It is hardly necessary to say that the question whether this is a valid, charitable trust, cannot be affected by the fact that there is no court that has jurisdiction to enforce the trust.

Vidal *vs.* Girard, 2 How., 196.

1 Perry on Trusts, § 40.

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In the Supreme Court of the United States.

OCTOBER TERM, 1876.

THE UNITED STATES
v.
ANNIE FOX & OTHERS. } No. 104.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

Brief for the United States.

In the Supreme Court of the United States.

OCTOBER TERM, 1876.

THE UNITED STATES
v.
ANNIE FOX & OTHERS. } No. 104.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Charles Fox, of the city of New York, by his will, dated July 16, 1864, devised and bequeathed all the residue of his property, real and personal, after the payment of his debts, "*to the Government of the United States at Washington, District of Columbia, for the purpose of assisting to discharge the debt contracted by the war for the subjugation of the rebellious Confederate States.*" This devise included sundry parcels of land situate in the State of New York. (Record, 5, 6.)

The surrogate for the county of New York, upon the will being propounded for probate by the United States through its attorney, decreed:

"That the said last will and testament is inoperative and invalid and void as a devise of real estate.

"That said petitioner, the United States of America, is not entitled to and cannot lawfully take, receive or hold as devisee, in trust or otherwise, under said will and testament, the real estate devised thereby or any part thereof.

"That the real estate of the said Charles Fox, deceased, descends to his heirs at law.

"That the said petitioner, the United States of America, is the same artificial *person* or body politic or corporate described in said last will and testament as the Government of the United States, at Washington, District of Columbia.

"That the said last will and testament is valid and operative as to the personal estate of the testator.

"That as to the personal estate, the petitioner, the United States of America, is the sole legatee under said will, after the payment of all lawful debts.

"That no lawful trust as to real or personal estate is created by or vests under said will in the petitioner, the United States of America.

"That as to personalty, the bequest in said will to petitioner is not operative as a trust, but as an absolute gift, the terms of said bequest respective to the purpose thereof constituting no legal restriction upon the use of the legacy.

"That said instrument is admitted to probate as a will of personal estate only." (Rec., p. 73.)

From this decree the United States appealed to the supreme court of the State, which affirmed the same, (Record, 81; 63 Barb., 158,) and thence to the court of appeals, which also affirmed the decree, (Record, 85; 52

N. Y., 530,) and thereupon the United States sued out a writ of error to this court.

The contestants of the will moved, at the October term, 1876, to dismiss the writ of error for want of jurisdiction. It was directed that this motion be argued with the merits of the cause and when it was reached in its regular order, the motion being based upon grounds very analogous to, if not identical with, those involved in the general discussion of the case.

STATUTES.

"A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, * * * * * * where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court on writ of error." (Rev. Sts., 132, § 709; 1 Sts. at Large, 85; 14 Ibid., 386.)

The act passed by the New York legislature and approved March 3, 1787, c. 47, declared that every person having an estate in fee, or of inheritance, &c., "shall have full and free liberty, power, and authority to give, dispose of, will or devise it to any person or persons (except bodies politic and corporate) by his last will and testament in writing," &c., "at his own free will and pleasure." (1 Greenleaf's Laws, 386–7.)

In the revision made in 1828, Chap. VI, Title 1, Art. 1, "Of wills of real property and the proof of them," it was provided:

"SECTION 1. All persons, except idiots, persons of unsound mind, &c., may devise their real estate by a last will and testament, duly executed according to the provisions of this title.

"SEC. 2. Every estate and interest in real property descendible to heirs, may be so devised.

"SEC. 3. Such devise may be made to every person capable by law of holding real estate; but no devise to a corporation shall be valid, unless such corporation be expressly authorized by its charter, or by statute, to take by devise." (2 Rev. Stats., 56, 57.)

In the compilation of 1869 the foregoing sections appear in precisely the same phraseology. (New York Statutes at Large; 2 Rev. Stats., 58.)

ASSIGNMENT OF ERRORS.

1. The United States assign for error the final decree of the court of appeals, being the highest court of the State of New York, affirming the decree of the general term of the supreme court of that State, (Record, 88, folio 176,) by which it was "ordered and adjudged that the decree of the surrogate of the county of New York, (hereinbefore recited,) made and entered on the 24th day of March, 1871, mentioned in the appeal of the appellants and in the petition of the appeal to this court, be, and the same is hereby, affirmed with costs." (Record, 81, folio 156.)

2. The plaintiffs in error assign for error the decree of the court of appeals of the State of New York affirming the judgment of the supreme court of that State, which affirmed the judgment and decree of the surrogate of the city of New York, (Record, 73,) "that said last will and testament is inoperative, invalid, and void

as a devise of real estate; that the petitioner, the United States of America, is not entitled to, and cannot lawfully take, receive, or hold, as devise in trust or otherwise, under said last will and testament, the real estate devised thereby, or any part thereof; that the real estate of the said Charles Fox, deceased, descends to his heirs at law; that no lawful trust as to real or personal estate is created by or vests under said will in the petitioner, the United States of America; that as to personalty, the said bequest in said will to petitioner is not operative as a trust, but as an absolute gift, the terms of said bequest respecting the purpose thereof constituting no legal restriction upon the use of the legacy; that the said instrument is admitted to probate as a will of personal estate only."

BRIEF.

I.

We respectfully submit that the question presented by the motion to dismiss is identical with that which arises upon the merits. The motion is predicated upon the assumption that the record presents no Federal question; but to us it seems that it was only and purely upon such a question that the parties were at issue.

The plaintiffs claimed, under and by virtue of their constitution, the title, right, and privilege to hold these lands devised to them by Charles Fox, and immunity from that legislation of the State of New York which denies to corporations (unless specially authorized by their statutes) the right to take or hold devised real estate. (Clements *v.* Berry, 11 Howard, 398; The Banks *v.* The Mayor, 7 Wallace, 22.)

The decision, adverse to the proponents of the will, was a determination that the Constitution of the United States did not confer power upon the Government to take and hold devised lands within the State of New York; for if the national Constitution did permit this to be done, no State legislation could take away or abridge this right; nor, if the Constitution withheld the right, could any State give or enlarge it. (McCulloch *v.* Maryland, 4 Wheaton, 404; Sch. Exchange *v.* McFaddon, 7 Cranch, 136; Runyon *v.* Coster, 14 Peters, 130.)

A perusal of the Constitution ascertains that there is no express declaration of a power to accept a devise or bequest of property to be applied to national uses. If it exists, it is as an implication from those conferred in terms, or from the fact of the creation and existence of the Federal sovereignty.

When the people of the United States instituted their frame of government, they bestowed upon it those rights and powers which they understood to pertain to sovereignty, "with all which that term implies"—certainly, at least, so far as those rights and privileges were "necessary and proper" to the discharge of the peculiar functions of the General Government. Their ideas of those rights, powers, and privileges were derived from the constitution of the mother country. If the experience of a century in peace and war has demonstrated anything, it is that the more liberal interpretation of the Constitution will better subserve the purposes for which it was ordained than will the restricted one, which has been carried so far as to deny that it authorized the use of force to prevent its own destruction. The people changed the league of States, so as to create a supreme

Government. (Marvin *v.* Hunter, 1 Wheaton, 304, 324; 4 Wheaton, 404; Gibbons *v.* Ogden, 9 Wheaton, 187.)

As it was stated in the brief filed upon the motion to dismiss, "It is submitted that among the prerogative powers enjoyed by the United States Government, under the Constitution, as necessarily inherent in its sovereign character and essential to the proper exercise of its sovereign functions, is that of acquiring property for public purposes in every part of the country, by all the usual methods known to the law; and that this power extends to real property as well as to personal, and to taking by devise as well as by ordinary conveyance. Indeed, it is difficult to see any distinction in respect of this between real and personal property and between devises and conveyances. If a State can forbid the Government from taking real estate by devise, it may forbid its taking by grant;" if it can prevent its taking realty, it can personalty.

Marshall, C. J., said, in delivering his opinion in United States *vs.* Maurice, 2 Brock., 109, answering the objection that the United States could enter into no contract not previously directed by statute, "The United States is a Government, and consequently a body politic and corporate, capable of attaining the objects for which it was created by the means which are necessary for their attainment. This great corporation was ordained and established by the American people, and endowed by them with great powers, for important purposes. Its powers are unquestionably limited; but while within those limits, it is a perfect government as any other, having all the faculties and properties belonging to a government, with a perfect right to use them freely, in order to accomplish the objects of its institutions. It

will certainly require no argument to prove that one of the means by which some of these objects are to be accomplished is contract; the Government, therefore, is capable of contracting, and its contracts may be made in the name of the United States."

This court indicated its assent to these propositions, in the case of the United States *v.* Tingey, 5 Peters, 128, where it held, per Story, J.: "Upon full consideration of the subject, we are of opinion that the United States have such a capacity to enter into contracts. It is, in our opinion, an incident to the general right of sovereignty," &c. And it had long before been decided that suit might be maintained by the United States upon such a contract without legislative authority first obtained. "It would be strange to deny to them a right which is secured to every citizen of the United States." Dugan *v.* United States, 3 Wheat., 181; Cotton *v.* United States, 11 Howard, 231.) Upon judgments recovered in such suits it is an every-day occurrence for the United States to seize, hold, and sell land. (United States *v.* Bradley, 10 Peters, 359; United States *v.* Lynn, 15 Peters, 311.) In 1870, referring to the United States *v.* Tingey, this court said, per Swayne, J.: "The decision was put upon the ground that the Government had the capacity to make the contract; that the United States were a body politic, and that, as *incident to the general right of sovereignty*, it was competent to enter into any contract not prohibited by law, and found to be expedient in the just exercise of the powers confided to it by the Constitution. "Dugan *v.* United States, 3 Wheat., 172, was referred to as sustaining this proposition. It was remarked that *a different principle would involve a denial to the General and the State governments of the*

ordinary rights of sovereignty." (United States *v.* Hodson, 10 Wallace, 407.)

Except as involved in the power to borrow money, and to purchase sites for public works, there is no power to contract expressly given in the Constitution; none is explicitly conferred to make such contracts as were the foundation of the suits in which the decisions above cited were rendered. Nor, it will be perceived, is this right to contract placed, in these opinions, upon any particular constitutional provision, but is implied from the creation by the people of a sovereignty to which such a right is presumably incident. "Among the enumerated powers we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental and implied powers, and which requires that everything granted shall be expressly and minutely described. Even the tenth amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word 'expressly,' and declares only that the powers 'not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people;' thus leaving the question, whether the particular power which may become the subject of contest has been delegated to the one government or prohibited to the other, to depend upon *a fair construction of the whole instrument.* (McCulloch *v.* Maryland, 4 Wheaton, 466.) The familiar argument in this case, and in the other kindred opinions of Chief-Justice Marshall, established conclusively the existence of implied powers derived from, and to effectuate the purposes of, those expressly conferred by the Constitution. Even the ablest

commentators have found little to do but to state the process of reasoning pursued in these opinions, which gave to the Constitution a force and character that alone made it worth defending. (1 Kent's Com., Lecture XII, and *251–4; 1 Story on Const., § 433 *et seq.*; 2 Story on Const., §§ 1236–1294; Cooley's Const. Lim., *63.)

To this court, for its expositions and construction of the Constitution, which have made it valuable and practically useful to subserve all the demands of a century of change, a vast extension of territory, and a tenfold increase of population, the people are even more indebted than the original founders of that instrument.

The Constitution contains no express recognition of the power to take land for public uses by right of eminent domain. For more than three-quarters of our national existence it was either not exercised, or only through the assent and agency of the several States, and it is but recently that it has been exerted solely through federal legislation and courts. In a debate in the Senate, April 19, 1860, participated in by Messrs. Bayard, Collamer, Gwin, Mason, Wigfall, Fessenden, and Jeff. Davis, the existence of this right was controverted by most of these Senators, and the bill to regulate its exercise defeated. (Cong. Globe, A. D., 1859–'60, Part 2, pp. 1790–'92, and Part 4, p. 3297.) In New York the right was exercised through the State court, under the authority of State statutes. (United States *v.* Dumplin Island, 1 Barb., 24.) But though long dormant, this power always existed, and was necessarily implied in the very idea of sovereignty. (Kohl *v.* United States, 91 U. S., 371 *et seq.*)

The exercise of the right of eminent domain in this way is a taking of land for a public use. Being entitled to do

this by a process *in invitum*, it would certainly seem that it might also accept land, for another and different public use, when voluntarily donated or devised. It has the power to acquire land—to take and hold it for public purposes. It not only does so in cases like that of Kohl *v.* United States, but in those numerous instances in which land is acquired, with or without judicial proceedings, in order to secure, liquidate, or compromise debts due to the government. Power to bind and accept land for these purposes has been recognized, by legislation and decisions, ever since the early days of the republic. The validity of the statutes giving priority to debts due to the United States is *inferred* from the clause relating to the payment of the public debt, because this is an appropriate means of accomplishing this purpose. (United States *v.* Fisher, 2 Cranch, 396; Metropolitan Bank *v.* Van Dyck, 27 N. Y., 437.) The act of July 11, 1798, c. 72, § 15, (1 Stats., 594,) gives a lien upon the real estate of debtors to the Government and provides for the sale of it; which right has been continued and extended down to the present time. (R. S., §§ 3629, 3630.) It defeats the lien of prior judgment-creditors upon real estate. (Thelusson *v.* Smith, 2 Wheaton, 396; United States *v.* Duncan, 4 McLean, 607, and 12 Ill., 223; United States *v.* Mechanics' Bank, Gilpin, 51.) A similar royal prerogative in England "goes back as far as the period of legal memory." (Giles *v.* Grover, 9 Bing., 128, 192; Hoke *v.* Henderson, 3 Dev., N. C., 17.)

Thus we see that the Government may not only take land with the strong hand for the purpose of erecting forts and buildings thereon, but in order to obtain payment of its dues, that it may more readily satisfy its own creditors. (Neilson *v.* Lagow, 12 Howard, 98–108.)

True, the necessity is more stringent in the one case than in the other; but the degree of necessity is of no consequence, as was declared in this case of United States *v.* Fisher, relating to the priority of the claims of the Government upon its debtors, and in repeated decisions since. That claim was based on the constitutional provision relating to the payment of the public debt, to accomplish which "Congress must possess the choice of means, and must be empowered to employ *any* means which are in fact *conducive* to the exercise of a power granted by the Constitution. The Government is to pay the debt of the Union, and must be authorized to use the means which appear to itself most eligible to effect that object." (United States *v.* Fisher, 2 Cranch, 396.) "Let the end be legitimate; let it be within the scope of the Constitution; and *all* means, which are appropriate, which are plainly adapted to the end, and which are not prohibited, but are consistent with the letter and spirit of the instrument, are constitutional." (2 Story on Const., § 1255; McCulloch *v.* Maryland, 4 Wheaton, 420–3; Legal Tender Cases, 12 Wallace, 536 *et seq.*; Hepburn *v.* Griswold, 8 Wallace, 614 *et seq.*) The power to make its notes a legal tender is deduced from the power to borrow money and to pay the debt. (Same cases; Metropolitan Bank *v.* Van Dyck, 27 N. Y., 400.)

Certainly, if priority of claim upon the estates of its debtors be a legitimate deduction from this power of paying the public debt and caring for the general welfare, *a fortiori* should the acceptance of lands and goods voluntarily offered be deemed "*bona fide*, appropriate to the end." It is directly conducive to the end proposed; vastly more so than those instances of legislation named in the legal-tender cases, 12 Wallace, 537, to the purposes there mentioned.

Not only does the United States acquire lands by right of eminent domain, by conveyance, by levy and civil procedure, but it may also acquire them within the limits of a State, and without its assent, by conquest. (Titus *v.* United States, 20 Wallace, 483; United States *v.* Huckabee, 16 Wallace, 434; or under confiscation acts. Union Ins. Co. *v.* United States, 6 Wallace, 759.) The power to take and hold lands, either by contract or by force, cannot be denied.

II.

Objection is made that the United States are to hold these devised lands in trust. All property taken by it, real or personal, by right of eminent domain, by force or contract, is held upon the same trust, for public purposes. Land taken by its right of priority or with other creditors is taken upon this identical trust, that they shall be converted into funds to aid in paying the public debt. "As a party to the suit, no one doubts the power of the Government, through its properly authorized agent, to direct the course of the suit as shall best advance the public interest. If a compromise be necessary for that interest, it may be made. That was what was done in the present case. The lands were taken, not as a purchase, but to secure the debt of the late receiver. And these lands were sold on a credit, in order that the sum due by the receiver might be paid. *It was a case of trust, recommended by the public interest,* and opposed to no law or public policy." (United States *v.* Lane, 3 McLean, 367; Vidal *v.* Girard, 2 Howard, 187.)

The question is not whether or no the United States,

as a landed proprietor, are subject to the *lex rei sitæ*, like other land-holders, but as to their right to be a proprietor. Their rights and liabilities upon bills of exchange are the same as those of individuals, (United States *v.* Bank of Metropolis, 15 Peters, 392; Bank of United States *v.* United States, 2 Howard, 711; United States *v.* Barker, 12 Wheaton, 561, and 4 Wash. C. C., 454; Dixon *v.* United States, 1 Brock., 177; United States *v.* Wilder, 3 Sumner, 308;) but their right to *issue* such bills is not created, dependent upon, nor affected by local law.

III.

It is sufficiently well established that the United States may take by grant.

As a rule, all persons, natural or artificial, who can take by grant can also take by devise, and in fee or in trust. (Vidal *v.* Girard, 2 Howard, 187; 1 Perry on Trusts, chap. 2, §§ 38–45.)

"The sovereign may sustain the character of a trustee." (1 Perry on Trusts, § 40.) "The United States, and each one of the separate States, may sustain the character of a trustee. They have legal capacity to take and execute trusts for every purpose." (*Id.*, § 41.) In the following sections he states generally the power of corporations to accept trusts, and especially such as relate to matters in which the corporations have an interest.

Here the devise and trust were those in which the Government and the people it represents were solely interested.

The famous will of Peter Thelluson directed that, in case of the failure of issue, or of their refusal to bear his surname, his estate was to go to the King for the

benefit of the sinking-fund. (Thelluson *v.* Woodford, 4 Vesey, 235; Boyle on Charities, 60.)

In Newland *v.* The Attorney-General, 3 Mer., 684, stock was bequeathed "to His Majesty's government, in exoneration of the national debt." Lord Eldon directed it to be transferred to such person as the King, under his sign-manual, should appoint.

IV.

The decree alleged by us to be erroneous sets up the hereinbefore-cited statute of New York as taking the United States out of the scope of this general principle. Two answers may be given to this proposition, viz: 1. That the statute does not purport to include the United States within its terms; and, 2. That it would not be competent for the State legislature so to affect Federal powers and rights, even if such were the intention.

1. "It is a familiar principle that the King is not bound by any act of Parliament unless he be named therein by special and particular words. The most general words that can be devised, (for example, any person or persons, bodies politic or corporate,) affect not him in the least, if they may tend to restrain or diminish any of his rights and interests. He may even take the benefit of any particular act, though not named. The rule thus settled respecting the British Crown is equally applicable to this Government, and it has been applied frequently in the different States, and practically in the Federal courts. It may be considered as settled that so much of the royal prerogatives as belongs to the King in his capacity of *parens patriæ*, or universal trustee, enters as much into our political state

as it does into the principles of the British constitution." (Savings Bank *vs.* United States, 19 Wall., 239.)

The doctrine as to statutes, above referred to, with its limitations, is well stated in Chitty on Prerogative, 382–384, and is recognized and established in New York in favor of the State. (People *vs.* Gilbert, 18 Johns, 227; People *vs.* Rosseter, 4 Cow., 143.)

"But independently of any doctrine founded on the notion of prerogative, the same construction of statutes of this sort ought to prevail, founded upon legislative intention. Where the Government is not expressly, or by necessary implication, included, it ought to be clear from the nature of the mischiefs to be redressed, or the language used, that the Government itself was in the contemplation of the legislature, before a court of law would be authorized to put such an interpretation upon any statute. In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to them applies with very different, and often with contrary, force to the Government itself. It appears to me, therefore, to be a safe rule, founded in the principles of the common law, that the general words of a statute ought not to include the Government, or affect its rights, unless that construction be clear and indisputable upon the text of the act." (United States *v.* Hoar, 2 Mason, 314; United States *v.* Davis, 3 McLean, 483.)

The first clause of the section under examination says: "§ 3. Such devise may be made to every person capable by law of holding real estate." This would embrace corporations as well as individuals, artificial as well as natural persons. (The Binghamton Bridge, 3 Wallace,

52; Ang. and Ames on Corps., 1; 2 Kent's Com., *215; Dartmouth College *v.* Woodward, 4 Wheaton, 636; Beaston *v.* Bank, 12 Peters, 102,) and books and reports, *passim.*

"It is a rule of construction acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power that which was not granted; that which the words of the grant could not comprehend." (Gibbons *v.* Ogden, 9 Wheaton, 191.)

The exception found in the concluding clause of the section in question obviously relates only to such corporations as are created or authorized by statute or charter of the State. Its language shows that the great political corporation, created by the people themselves, was not in the mind of the legislature in enacting this statute. Nor was the Government at all within the mischiefs to be remedied. (McCaughal *v.* Ryan, 27 Barb., 408, *et seq.*)

2. If the legislature can be supposed to have intended to act upon and limit the capacity of the Federal Government to take lands, the attempt was beyond the scope of its authority and futile. The United States have the power to take; "the existence of this power must negative the existence of any right which may conflict with and control it." (Johnson *v.* McIntosh, 8 Wheaton, 588.) "If the right to acquire property for such uses may be made a barren right * * by the action of a State, prohibiting a sale [and a sale can be prohibited as well as a devise] to the Federal Government, the constitutional grant of power may be rendered nugatory, and the Government is dependent for its practical existence

upon the will of a State." (Kohl *v.* United States, 91 U. S., 371, *et seq.*; Weston *v.* Charleston, 2 Peters, 468.)

V.

The argument that the statute is a restraint upon the power of the citizen to devise, and not upon that of the Government to accept, is a mere subterfuge. A tax on the contractors carrying the mail is a tax on the mail, because ultimately paid by the Post-Office Department. (Achison *v.* Huddleson, 12 Howard, 293, 298; Searight *v.* Stokes, 3 Howard, 168; Neil *v.* Ohio, 720, 742–3.) A tax on a contract affects the power to borrow. (Weston *v.* Charleston, 2 Peters, 468.) A tax on capital is a tax on the stock in which it is invested. (The Bank-Tax case, 2 Wallace, 208–9.) A license-tax for the sale of goods is a tax on the goods. (Welton *v.* Missouri, 91 U. S., 275; Brown *v.* Maryland, 12 Wheaton, 425, 444; Ward *v.* Maryland, 12 Wallace, 418; Woodruff *v.* Parham, 8 Wallace, 123; State Freight Tax, 15 Wallace, 232.).

VI.

The fact that the case turns upon the construction of a New York statute does not oust the jurisdiction of this court. (Smith *v.* Maryland, 6 Cranch, 286; Fairfax *v.* Hunter, 7 Cranch, 603; Martin *v.* Hunter, 1 Wheaton, 304; Ohio Trust Company *v.* De Bolt, 16 Howard, 432–3; Gelpcke *v.* Dubuque, 1 Wallace, 216.)

It is only *where no right is claimed under the authority of the United States*, in opposition to a State statute, that the construction by the State courts of State legislation is final. (Congdon *v.* Goodman, 2 Black, 574; Mich. Cent. R. R. *v.* Mich. So. R. R., 19 Howard, 378; Lytle

v. Arkansas, 22 Howard, 203; Porter *v.* Foley, 24 Howard, 415; Attorney-General *v.* Federal Street Meeting-House, 1 Black, 262; Green *v.* Van Buskirk, 5 Wallace, 307.)

If the constitutionality of the State statute (as against the Federal Constitution) *must* have been drawn in question, as this is apparent from the whole record, this court has jurisdiction. (Wilson *v.* Blackbird Creek Co., 2 Peters, 250; Satterlee *v.* Mathewson, *Id.*, 409, 410; Craig *v.* Missouri, 4 Peters, 410; Furman *v.* Nichol, 8 Wallace, 56; Bolling *v.* Lersner, 91 U. S., 594.)

VII.

In the case of the Smithsonian Institution, this Government took by devise, to a charitable use. No matter whether the will was probated here or in England, the property was taken and the use executed here. The statute relating to it was not passed till after the will was proved. (Act of August 10, 1846, c. 178, § 1–9, Stats., 102; President of United States *v.* Drummond, cited in Whicker *v.* Hume, 7 House of Lords, 155.)

This devise was undoubtedly a good charitable trust. (Newland *v.* Attorney-General, 3 Meriv., 683; Nightingale *v.* Goulburn, 5 Hare, 484, s. c. 2 Phil., 594; Ashton *v.* Lord Langdale, 4 De Gex and Sm., 402; Coggshall *v.* Pelton, 7 Johns. Ch., 292; Cresson's Appeal, 30 Penn. St., 437; Perin *v.* Carey, 24 How., 506; 2 Perry on Trusts, §§ 697, 704, 705, and cases cited.)

It would formerly have been held good in New York, and the recent decisions there to the contrary are a change of position, not yet fully acquiesced in. In an elaborate note, 2 Perry on Trusts, § 748, it is said that even in New York, "there seems to be a want of con-

fidence in the stability of the system,' and a want of agreement both among the lawyers and judges, so that the whole matter is yet in a transition state.'

VIII.

If an act of Congress were necessary, (as in the case of Smithson's will, one was enacted after the will was proved,) this would not affect the validity of the instrument. (Inglis *v.* Sailors' Snug Harbor, 3 Peters, 112; 2 Perry on Trusts, § 730, and cases cited.)

The assent of a devisee or legatee will be presumed on very slight evidence. It is enough that the attorney of the United States propounded the will for probate, and that it is presented here by the Government. "The United States will be admitted to be a corporation It is incidental to a corporation to sue and be sued, to convey and to take property. Proper organs for conveying must certainly be provided before this power can be executed; *but if it be incidental to this ideal being to receive, then a conveyance to it, or an obligation to it by its proper name*, unless there be no person to whom it can be delivered. *A claim to the obligation, by the officer authorized by law to assert that claim, would seem to be sufficient evidence of assent to the contract*, and if there be any person appointed to transact the particular business, a delivery to him would be a good delivery." (Dixon *v.* United States, 1 Brock., 181; Osborn *v.* United States, 9 Wheaton, 830–1.)

would be valid

IX.

The will should have been admitted to probate. Private citizens have no right to set up the incapacity of the United States, or any other corporation, to take if

the State does not intervene for this purpose. (Vidal *v.* Girard, 2 Howard, 191; Girard *v.* Philadelphia, 7 Wallace, 14; 1 Perry on Trusts, § 45, and cases cited.)

X.

From a full conviction that this instrument will be found valid in its full extent and precise terms, no discussion will be had of the doctrine of an equitable conversion of the realty, presented to the court below, but that proposition will be submitted without argument.

EDWIN B. SMITH,
Assistant Attorney-General.

In the Supreme Court of the United States,

October Term, 1874.

THE UNITED STATES,

Plaintiffs in Error,

vs.

ANNIE FOX AND OTHERS,

Defendants in Error.

In Error to the Court of Appeals of the State of New York.

Brief Submitted by the Defendants in Error.

JAMES FLYNN,

Counsel for Defendants in Error,

No. 7 Warren St., New York City.

In the Supreme Court of the United States.

OCTOBER TERM, 1874.

THE UNITED STATES,
Plaintiffs in Error,

vs.

ANNIE FOX AND OTHERS,
Defendants in Error.

Brief submitted by the Defendants in Error.

Statement of Facts.

On the 16th day of July, 1864, Charles Fox, of the city of New York, made his last will and testament (fols. 17. 18), whereby he devised, or which purported to give or devise, to the Government of the United States, at Washington, certain real estate, situated in the city of New York and elsewhere, for the purpose of assisting to discharge the debt contracted by the war, and thereafter on the 2d day of February, 1870, the said testator died (fol. 16). The United States District Attorney for the Southern District of New York then applied by petition to the surrogate of the city and county of New York to admit the said will to probate (fol. 16).

The infant heirs of said Fox contested the will (fols. 21, 23.)

The surrogate decided that the will was "inoperative, invalid

" and void as a devise of real estate," and that the United States was not entitled to and could not lawfully " take, receive " or hold, as devisee in trust, or otherwise, under said last will " and testament, the real estate devised thereby or any part " thereof." He also held and decided that the will was good as a will of personal estate, and that the United States was sole legatee, and could take the personal estate as such (fol. 138).

The United States appealed from that decision to the Supreme Court (fols. 139, 140, 142), where the said decree was affirmed (fols. 155, 156). The United States then appealed to the Court of Appeals of the State of New York (fols. 159, 160), where the judgment appealed from was affirmed (fols. 12, 13, 14), and the record was thereupon remitted to the Supreme Court to be enforced as the judgment of that court (fol. 14), and by order of the Supreme Court judgment was then entered in accordance with the decision of the Court of Appeals (fols. 161, 162, 163, 164, 165, 166, 167).

A writ of error to remove the cause to the Supreme Court of the United States for review was then applied for and granted on the grounds (fols. 1, 2, 3):

1. That there " was drawn in question the validity of an " authority exercised under the United States."

2. That there " was drawn in question the validity of a stat- " ute of the State of New York as against the United States, " on the ground of its being repugnant to the Constitution of " the United States, and the decision was in favor of its validity."

3. That there was " drawn in question the construction of " the Constitution of the United States in respect to its au- " thorizing the said United States to take real estate devised " to it, and the decision was against the title to said real es- " tate set up and claimed under said Constitution."

And now the heirs of said testator, the defendants in error, apply to dismiss the appeal or writ of error, for want of juris-

diction, claiming that no such matters or rights were drawn in question, and that neither section 25 of the Judiciary Act, nor the Act of February 5, 1867, gave to the plaintiff in error the right to have the judgment in this case taken to the Supreme Court of the United States for review.

POINTS.

I.

" The validity of an authority exercised under the " United States," was not drawn in question by the record or proceedings in that cause or proceeding.

As the plaintiff in error defines or explains it, he claims that the authority of the secretary of the treasury or other proper officer of the United States, to receive on behalf of the United States, the property real and personal, bequeathed and devised, was questioned, and that the decision was against the validity of such authority.

It does not appear from the record nor from any proceeding in the cause, that any such question was before the court, or that the court decided any such thing.

No authority had been or was being exercised under the United States, or by any officer of the United States. Nothing done by any such officers was held invalid.

The devise was of land situated in the State of New York, and the will was made by a citizen of that State, in pursuance of the *statutes of that State*, and the court simply held that the United States of America was not entitled to and could not lawfully take the real property under *that will*, made in pursuance of the New York statutes, which did not authorize such a disposition by will or devise of real property within its limits.

The acts done were done by the testator and the surrogate, and the only authority exercised was so exercised under the statutes of the State of New York.

There are many cases where the validity of acts done by

officers, agents or employes of the general government are drawn in question in State courts, and the words in the Judiciary Act and Act of 1867. "*Authority exercised under the United States*" has reference to such cases; but it would be a forced and extraordinary construction of the act to hold it to extend to a case where no authority has been exercised under the United States, where no act done by any officer, agent or other person, has been done under the direction of, or in pursuance of, any law of the United States, and where no such act or proceeding has been held invalid.

The act of Congress does not purport to nor was it ever intended to apply to any such case.

This court has uniformly held that to entitle a party defeated in a State court to bring his case to this court for review by writ of error, the case must be brought *clearly* and indisputably within the provisions of the act of Congress.

Ocean Ins, Co. *vs.* Polleys, 13 Peters, 157, 164.
Commercial Bank of Cincinnati *vs.* Buckingham's Exrs., 5 How., 317, 341, 342.
(See other cases cited in the following 3d Point.)

Even if the question had been raised, and the court had held that the secretary of the treasury, or other officer of the United States, could not or had not authority to receive the property devised by that will, that would not have been drawing in question the validity of an authority exercised under the United States, for these among other reasons.

1. No authority has or had been exercised. The statute, does not provide for the case of an act not yet done, and which may never be done, or for the case of a decision that an authority cannot be lawfully exercised, which has never been, and may never be exercised or attempted.

2. The question could not arise in this case in any form. The secretary of the treasury and other officers are but agents of the government. They are not the government. Their authority to receive and hold property belonging to the government, or to do any other act for the govern-

ment, is simply their commission or power of attorney and a question of the sufficiency of that cannot, or at least has not, in any form, come in question in this case. The question is a question of *title* of their principal, and not of the sufficiency of the power or authority given to them to act for their principal.

When the question of title is established in their principal, and these officers or agents in the exercise of the power conferred on them, deal with or dispose of the property, or bring actions to recover it, a question as to the validity of an authority exercised by them, may be brought in question, but not before.

It cannot be necessary to consider this question further. The writ cannot be sustained, because of this assignment or ground of error.

II.

Neither is the second ground or assignment of error warranted by any facts in the case.

There was not drawn in question the *validity* of any statute of the State of New York, nor was any statute of the State held or claimed to be repugnant to the Constitution of the United States. The United States did not claim the property under or because it was given by the Constitution of the United States, nor was the will or devise based upon, authorized, or regulated by the Constitution of the United States.

The right to dispose of land by will or devise, and the validity of the devise, are regulated and governed solely by State laws.

White *vs.* Howard, 46 N. Y., 144.
Levy *vs.* Levy, 33 N. Y., 136.
United States *vs.* Crosby, 7 Cranch., 115.
McCormick *vs.* Sullivant, 10 Wheaton, 192.

A statute of the State of New York authorized the disposi-

tion of real property within the State, under certain restrictions, and the only right the testator in this case had to dispose of his property by will or devise was given by that statute, as *by the common law he had no such rights.*

The testator in thus attempting to dispose of his property devised it to the "United States of America," and the question arising on that will was not whether the statute was *valid* or not, *but whether the statute authorized such a disposition of his property or whether it authorized him to make such a will.* It was a question, as to the meaning and effect of the statute, purely a question of *construction.*

Commercial Bank of Cincinnati *vs.* Buckingham's Exrs., 5 How., 317, 341, 342.

The United States did not claim that the statute was *invalid,* but only that the statute as it reads authorized the testator to devise his land to the United States and to make the United States a trustee for its own creditors. The United States was the petitioner offering the will for probate, and was not in a situation to question the validity of the statute, as questioning that would be questioning the validity of the will itself. Suppose on the appeal the United States had claimed and the court had held that the statute was void, the will would have fallen with it. It will thus be seen that the statute was not claimed on the part of the United States to be invalid, and if the validity of the statute had been in question and had been held valid it would not have been a decision against the United States, but on that question would have been in its favor.

Again, it is claimed by the plaintiff in error that the validity of the statute was in question and held valid against the right of United States, but that it was held valid on the ground that it was *repugnant* to the Constitution.

To be *repugnant* to the Constitution it must be *contrary to* or *opposed to* the Constitution. It must deny to the United States a right which the Constitution gives, and which the United States could exercise, if the statute was not in existence.

Does the United States Constitution provide for the disposition of land in the several States by will or devise?

Are not those State rights governed by and depending on State laws?

Does the Constitution restrict the right of a State to provide for and regulate the disposition of property, within its limits, by will or devise? The law on this subject is too well settled and too well known to leave it a debatable question.

There is nothing in the Constitution on the subject, and nothing there for that statute to be repugnant to. It might as well be claimed that a statute of any foreign country, regulating the disposition of its real estate, by will or devise, is repugnant to the Constitution of the United States. There was never such a question in this case.

In the assignment of errors (fol. 8) it is claimed or alleged, *not that the statute is invalid*, but that as *construed by the courts*, it was drawn in question, and that the decision was in favor of its validity *as construed*.

Can there be a more complete *felo de se* than this?

Is there not here an admission that it was a question of the *construction* or *meaning* of a statute, and not a question of its validity?

And, that being so (assuming that there was even a question of construction before the court), the writ must be dismissed for want of jurisdiction, as was done in the case of the Commercial Bank of Cincinnati *vs.* Buckingham's executors, before cited, 5 How., 341, 342.

III.

The other ground or assignment of error has still less to support it. It is there alleged that the construction of the Constitution was drawn in question, in respect to its authorizing the United States to take real estate devised to it.

What clause of the Constitution was drawn in question? The plaintiff in error does not point out any, nor does the record show any.

The act of 1867, which supersedes or has repealed the pro-

visions of sec. 25 of the Judiciary Act, does not provide for assigning such a ground of error. But assuming that to be a proper assignment of error, there are these reasons why that ground of error is not good or sufficient to give this court jurisdiction to review the judgment in this cause by writ of error.

1. The writ and assignment of error should show what clause of the Constitution has been construed or drawn in question, or at least the *record* should.

   Gibson *vs.* Chanteau, 8 Wallace, 314.
   Railroad Co. *vs.* Rock, 4 Wallace, 177.
   Suydam *vs.* Williamson, 20 How., 427.
   Christ's Church *vs.* Co. of Philadelphia, 20 How., 26.
   Taylor *vs.* Morton, 2 Black, 481.
   Bridge Proprietors *vs.* Hoboken Co., 1 Wallace, 116.

2. It is not sufficient even that such a question might have been raised, or even that such a question was argued, but the *record must show* that the question was in fact *raised* and *necessarily* decided.

   The Ocean Ins. Co. *vs.* William Polleys, 13 Peters, 157.
   Crawford *vs.* Branch Bank of Mobile, 7 How., 279.
   Mills *et al. vs.* Brown *et al.*, 16 Peters, 525.
   Commercial Bank of Cincinnati *vs.* Buckingham, 5 How., 341.
   Murdock *vs.* City of Memphis, 20 Wallace, 590.
   Lawler *vs.* Walker, 14 How., 159.
   Parmalee *vs.* Lawrence, 11 Wallace, 38.
   R. R. Co. *vs.* Rock, 4 Wallace, 177.

How or where does it appear in the record in this case that any clause of the Constitution was in question or construed?

It is said in the assignment of errors that the construction of the Constitution was drawn in question "in respect

"to its authorizing the said United States to take real "estate devised to them" (fol. 8).

An examination of the record will show not only that the construction of the Constitution was not thus drawn in question, but that no such question was decided.

The decision of the surrogate (fol. 138), which was affirmed, was, that the United States could not take the real estate devised by *that will*, and that as a devise of real estate *that will* was void. It was not decided that the United States could not take real estate devised to them, or that the United States could not be a devisee, but simply that the statutes of the State of New York did not authorize a devise of land situated in that State to the United States of America, or, as expressed in the will, "to "the Government of the United States at Washington." That is what the surrogate decided, and all that the record shows.

Looking further at the opinions of the courts on appeal, which however are no part of the record (51 N. Y. Rep., 355; 36 N. Y. Rep., 316; 13 Peters, 164, 165; 8 Wall., 317), it will be seen that both the appellate courts were of the opinion that, under the common law, or under the New York Statutes, the United States could not, as devisee, take the land, not that the Constitution of the United States did, or did not, authorize it.

Justice Andrews, in delivering the opinion of the Court of Appeals in the case, says: "It is not necessary in this "case to decide whether the United States could, with the "consent of a State, accept a devise of lands made to it "directly and unaccompanied by any trust. In view of "the origin and nature of the power to devise lands, of the "right of each sovereignty to determine the limitations "under which this power shall be exercised, and of our "statute upon the subject, the devise to the United States "in the will in question cannot be sustained."

52 N. Y., 533.

It must be apparent, without further argument, that there was *not* "drawn in question the construction of the

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1876.

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vs.

ALFRED W. BEASLEY, *Defendant in Error.*

ARGUMENT OF A. L. WILLIAMS,

Attorney for Defendant in Error.

GEO. W. MARTIN, KANSAS PUBLISHING HOUSE, TOPEKA.

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Attorney for Defendant in Error.

STATEMENT OF THE CASE.

This was a suit brought in the Circuit Court of the United States for the District of Kansas, at the June Term thereof, A. D. 1876, by Alfred W. Beasley against the Township of Burlington, in the County of Coffey, and State of Kansas, to recover the amount due upon sixty-four coupons, each for the sum of twenty-five dollars, together with interest thereon — the same being overdue. Of these coupons, as well as of the bonds to which they had been originally attached, the said Beasley averred himself to have become the true and lawful owner and holder for value before maturity, and also, to be such owner at the commencement of his suit as aforesaid.

The bonds to which these coupons had been attached

are a part of a certain series of sixteen bonds, each for the sum of $500, the whole amounting to the sum of eight thousand dollars, issued by said township December 3d, 1872, to aid one John S. Stow in the construction and completion and to furnish the motive power of a steam custom grist-mill in said township — the same belonging to the said Stow, and not being situated on a water-course, or operated by water-power.

A copy of one of said bonds is as follows, to wit:

$500. No. 1.

BOND OF BURLINGTON TOWNSHIP.

COUNTY OF COFFEY, STATE OF KANSAS.

UNITED STATES OF AMERICA.

BURLINGTON TOWNSHIP, in the County of Coffey, State of Kansas, promises to pay John S. Stow, or bearer, the sum of Five Hundred Dollars, on the third day of December, A. D. 1877, and interest thereon at the rate of ten per cent. per annum, payable semi-annually, upon presentation of the coupons therefor, hereto annexed: both principal and interest payable at the banking house of Northrup & Chick, in the city of New York.

This Bond is one of an issue of Eight Thousand Dollars, made for the purpose of aiding internal improvements in said township, and in pursuance of an act of the Legislature of the State of Kansas, entitled "An act to authorize counties, incorporated cities, and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, water-power, or other works of internal improvement, and providing for the registration of such bonds, the registration of other bonds, and the repealing of all laws in conflict therewith," approved March 2d, 1872.

In testimony whereof, the Township Trustee, Clerk and Treasurer have caused this bond to be issued, duly signed, attested and countersigned, this third day of December, A. D. 1872. H. R. FLOOK, *Trustee.*

Attest: G. N. MCCONNELL, *Clerk.*

Countersigned: H. L. JARBOE, *Treasurer.*

A copy of the above bond was attached to and made a part of said Beasley's petition.

The following is a copy of one of the coupons sued upon, to wit:

$25.00. No. 3.

The Treasurer of Burlington Township, Coffey County, Kansas, will pay to the bearer Twenty-five Dollars, at the banking house of Northrup & Chick, in the city of New York, on the third day of June, A. D. 1874, for six months' interest on Bond No. 1, issued on the third day of December, A. D. 1872.

Attest: G. N. McConnell, *Township Clerk.*
H. R. Flook, *Township Trustee.*

A copy of the certificate of registration, indorsed upon each of said bonds, is as follows, to wit:

I, D. W. Wilder, Auditor of the State of Kansas, do hereby certify that this bond has been regularly and legally issued; that the signatures thereto are genuine; and that such bond has been duly registered in my office, in accordance with an act of the Legislature, entitled "An act to authorize counties, incorporated cities, and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, ———— or other works of internal improvement, and providing for the registration of such bonds, the registration of other bonds, and the repealing of all laws in conflict therewith," approved March 2d, 1872.

Witness my hand and official seal, this 20th day of January, 1873.

{Seal of the Auditor of State. Kansas.—Jan. 29, 1861.} D. W. Wilder, *Auditor of State.*

The township set up two defenses; the second defense — the only one to be considered here — being, in substance, that on the 6th day of August, A. D. 1872, in the said township of Burlington, a special election was then and there held for the purpose of submitting to the electors of said township the following proposition, to wit:

"Shall the township of Burlington issue to John S. Stow, of said township and county, the bonds of said township to the amount of eight thousand ($8,000) dollars, to aid the said John S. Stow in the construction and completion and to furnish the motive power of a custom grist-mill at the town of Burlington, under the conditions as follows: Said bonds are to be made payable in four equal installments of two thousand ($2,000) dollars each, in five, six, seven and eight years, respectively, with interest as shall be determined by the board of officers issuing the some. Upon the issue of said bonds as aforesaid, said John S. Stow shall execute to said township his promissory notes for like amounts, to run

the same time, bearing the same rate of interest, and secure the payment of said several notes by first mortgage on his said mill and grounds on which the same is situate. The proceeds of said bonds are to be used exclusively in the completion of said work of internal improvement, and in paying the outstanding debts and liabilities incurred upon the said work of internal improvement, so far as said mill and machinery and improvements have progressed."

That a majority of the qualified electors of said township, voting at said election, voted in favor of the issuance of said bonds for the purpose aforesaid, and subject to the conditions above set forth.

That on the 3d day of December, A. D. 1872, the officers of said township, assuming to act under and by virtue of the election held as aforesaid, and also, assuming to act in pursuance of the above-entitled act of the Legislature of the State of Kansas, approved March 2, 1872, executed and delivered to the said John S. Stow the bonds of said township to the amount of $8,000—the same being sixteen bonds, numbered from 1 to 16 inclusive, each bond bearing date the third day of December, A. D. 1872, and being for the sum of $500, due as follows: Bonds Nos. 1, 2, 3 and 4, due in five years from said date; Bonds Nos. 5, 6, 7 and 8, due in six years from said date; Bonds Nos. 9, 10, 11 and 12, due in seven years from said date; Bonds Nos. 13, 14, 15 and 16, due in eight years from said date;—each and all of said bonds bearing interest from date at the rate of ten per cent. per annum, payable semi-annually, and for which interest coupons were thereunto respectively attached: both principal and interest payable at the banking house of Northrup & Chick, in the city of New York.

That for and in consideration of said bonds, the

above-named John S. Stow executed and delivered to said township his four certain promissory notes, each for $2,000, in accordance with the terms of the aforesaid proposition; and, to secure the payment of said note, with interest, executed a mortgage upon his said mill and the grounds upon which said mill is situate.

The said bonds were issued to aid a STEAM CUSTOM GRIST-MILL, not situated on a water-course or operated by water power.

That each and all of the bonds mentioned and described in plaintiff's petition are a part of the said series of sixteen bonds of said township, made and issued as aforesaid.

That each and all of the coupons mentioned and described in said petition, and constituting the several causes of action therein stated, are a part of the coupons for interest originally attached to the bonds made and delivered to John S. Stow as aforesaid.

That on the 31st day of May, A. D. 1875, in the District Court in and for said County of Coffey and State of Kansas, in a certain action wherein the said John S. Stow was plaintiff and the said Township of Burlington was defendant, said action having been brought by said plaintiff to obtain an order and decree for the delivery up to him of the aforementioned promissory notes, and for the cancellation of said mortgage on the records of said county, on the trial of said cause the court found that said notes and mortgage were given by said John S. Stow to said township without any consideration whatever, and that the same are null and void; that the court ordered and adjudged that said notes be delivered up to said plaintiff, and that the mortgage deed given to secure their payment be cancelled on the records of said county, which said order and

judgment were thereafter by said township duly complied with; and that for and on account of said series of bonds, together with the coupons for interest thereto attached as aforesaid, the said Township of Burlington has received no valuable consideration whatsoever.

To this second defense in defendant's answer, the plaintiff Beasley demurred, and for cause of demurrer said: that the said count does not state facts sufficient to constitute a defense to the plaintiff's causes of action.

On the hearing of the said demurrer, three points or questions arose, on all of which the judges were divided in opinion; these questions — the only ones before this court — being as follows, to wit:

"*First:* Does the second count of the defendant's answer set up a sufficient defense to the action?

"*Second:* Said bonds having been issued to aid a steam custom grist-mill, not situated on a water-course or operated by water power, was there any power or authority to issue the same?

"*Third:* If there was no such power or authority, are the bonds containing the recital therein appearing, valid in the hands of a holder thereof for value before maturity, who has no notice of the purpose for which the same were issued, other than as shown by the face of the bonds?"

ARGUMENT.

I have adopted the statement of the case made by plaintiff in error. From that statement there arise the three questions upon which the court below divided in opinion.

The first question is really a part of the second, consequently they will be treated as one.

"*First:* Does the second count of the defendant's answer set up a sufficient defense to the action?

"*Second:* Said bonds having been issued to aid a steam custom grist mill, not situated on a water-course or operated by water power, was there any authority to issue the same?"

It is not claimed by the defendant in error, that any statute of Kansas authorized the issue of bonds to aid a steam mill or that such a statute, if passed, would be constitutional. On the contrary, it is conceded that no such law exists or could constitutionally exist, and if this were a question as to the power of the Legislature to authorize taxation in aid of a private enterprise it would not be presented to this court.

It is further conceded, that a steam mill is a private enterprise; that it cannot be aided by taxation, and if the bonds in suit revealed on their face the fact that they were issued to aid such an enterprise, they would be void, and this suit would not have been brought.

Underlying all this, however, is the question involved in the third point upon which the court divided:

"*Third:* If there was no such power or authority, are the bonds, containing the recital therein appearing, valid in the hands of a holder thereof for value before maturity, who has no notice of the purpose for which the same were issued, other than as shown by the face of the bonds?"

These bonds, it will be noted, were issued under a confessedly constitutional law which authorized the issue of just such bonds. (Chapter 68, Laws of 1872.)

The first section of that law is as follows:

"SECTION 1. That the board of county commissioners of any county, the mayor and common council of any incorporated city, and the trustee, clerk, and treasurer of any municipal township, in this State, are hereby empowered to issue the bonds of such county, city, or township, in any sum necessary, not greater than ten per cent., inclusive of all other bonded indebtedness, of the taxable property of such county, city, or township, for the purpose of building bridges, free or otherwise, or to aid in the construction of railroads or water power by donation thereto, or the taking of stock thereon, or for other works of internal improvement."

Here, then, is express power constitutionally conferred to aid "works of internal improvement." Works of

internal improvement mean public works. Whether the definition given by Congress in the act of 1841, granting lands to the States to aid in works of public improvement, is considered, or whether resort be had to subsequent legislation of the States, or judicial construction by the courts, the result is the same: "Internal "improvements are such public improvements as will "justify taxation in their aid."

In a case like this, who shall determine whether a given work is public or private? — the authorities which issue the bonds, or the courts? The law, it will be observed, is general, and authorizes aid to *any* work of internal improvement, leaving *somewhere* the right to determine whether a given enterprise is a work of internal improvement or not. In what tribunal is that right vested? In case the bond is silent as to the purposes for which the proceeds are to be used, and contains a recital that it is issued for works of internal (*i. e.*, public) improvements, and in pursuance of a law, authorizing the issue of such a bond, then the determination of the municipal authorities is final, and the holder need make no farther inquiry. If the bond, however, in addition to saying that the bond is issued for internal improvements, proceeds to show what the purpose is, the declaration is not necessarily final, and the courts may interpose and declare that the purpose is not public, and hold the bonds void. Thus, if the bond recited that it was issued "to aid works of in- "ternal improvement, to wit, to aid John Smith in the "erection of a hotel, at the town of Podunk," the courts would very properly say: "This recital is merely the "expressed judgment of the officers of a municipality "that a hotel is a work of internal improvement. It

"does not conclude any one. The purpose being shown, "the declaration that it is public is mere surplusage, and "it is for us to determine the character of the purpose."

The bonds in this case recite a public purpose, and a due compliance with the law. It is admitted that the bonds are regular and valid on their face, that these identical bonds would have been valid if the proceeds had been used, in fact, for a work of public improvement, such, for instance, as the improvement of a public street. It is strange indeed, that a bond, valid on its face, issued by the proper authority, and authorized by law, should depend upon a question of fact, outside of the bond, for its construction or validity. I can readily see how facts outside of a bond may be used as a defense, in certain cases, to the bond; but how a question of fact can affect the character of such a bond I cannot see. One set of facts being established, the bond will be *construed* to read that it promises to pay so much; another set of facts being shown, the bond will read that the maker promises *not* to pay. Such a rule will not work. The bond must be *construed* by reference solely to it and the law under which it was issued. Extrinsic facts cannot be resorted to to aid the construction.

The purpose shown on the face of the bond, then, must determine its character, and not the purpose which extrinsic facts may establish. Particularly is this so in the case of innocent holders. If the holder were held to inquiries as to facts outside of, and beyond, the bond itself, for the purpose of ascertaining whether the bond had been, in fact, issued for a public or a private purpose, his researches might be interminable, and still lead to no certain conclusion. For instance, aid to railroads

is authorized by the law under which the bonds in question were issued. Public railroads of course are meant. If they were not public, no aid by taxation could be extended to them. Now, suppose bonds are issued to aid in the construction of the Topeka and Carbondale railroad, and recite that fact, and that they were issued in pursuance of law: still, the purchaser —under the views of counsel for plaintiff in error— would be compelled to look back of the bonds to see if the law has been complied with. He does so. He examines the records, sees that the petition, notice of election, election, and terms of the donation are regular. Thereupon he buys the bonds. Suit being brought, it is claimed that the *character* of the bonds is changed, and they are invalid by reason of the *fact* that the railroad is purely a private road, for the sole convenience of the owner, built upon ground obtained by purchase—not condemnation, carrying neither freight nor passengers, but run exclusively for the purpose of carrying coal from the owner's mine at Carbondale to the owner's mill at Topeka. Can the corporation, issuing such a bond with such a recital, go behind it, and set up such a state of facts to defeat it in the hands of an innocent holder, without notice? Certainly not, if the long and unbroken list of similar cases, decided by this court heretofore, has any force in this case.

ESTOPPEL.

Judge DILLON, in an article in *The Southern Law Review*, after examining all the cases in this court on the subject of municipal bonds, thus summarizes the principles to be deduced:

"The purchaser is bound to see that there exists legislative authority not in conflict with the State constitution

for the issue of the bonds or commercial securities of the municipal, public or *quasi* corporation, and is bound to notice the contents and recitals contained in the instruments: but if such bonds are duly executed by the proper officer, and if these officers are invested, by the true construction of the legislative enactment in that regard, with the power to decide whether conditions precedent have been performed, and the bonds contain a recital that such conditions have been complied with, or a recital which implies such compliance, whether the preliminary conditions consist of facts *in pais* or facts of record — the issue of the bonds, under such circumstances, with such a recital, is conclusive against the municipality as to the fact or facts recited or implied in the recital, and estops it, in an action by an innocent holder for value, before due, to show the contrary."

And in accordance with these views the learned judge gave judgment in this case.

And it may also be added as the settled law of this court, that such securities are valid in innocent hands, *although in* POINT OF FACT *issued for a purpose not authorized by law.*

This will, I think, be apparent from an examination of a few of the cases.

This logical result of the admitted negotiability of this class of securities has been consistently followed by this court, as numerous decisions show. And as often as the position has been assailed this court has reaffirmed it — each succeeding decision reasserting the doctrine with added emphasis. So that the law may now be safely asserted to be: *that if a lawful authority exists to issue bonds, and they are issued, executed by the proper officers, with a recital that all the conditions of the law have been complied with,* NO *defense seeking to impeach their validity can be interposed against the innocent holder for value, without notice, unless the invalidity is apparent upon the face of the bonds, or can be made to appear from an examination of the law authorizing their issue.* In

other words, in such a case the municipality issuing such bonds would be estopped by the recitals in the bonds from showing any fact outside of the bonds themselves, and the law under which they were issued, as a defense to their validity.

This may be stating the doctrine broadly, but it is, it seems to us, the necessary logical result of the law as frequently laid down by this court.

Knox County vs. Aspinwall is the leading case on this subject. In that case Knox county was authorized to take stock in a railroad, paying therefor in bonds, "*provided a majority of the qualified voters of said county, "at any annual election, shall vote for the same.*" The defense was, that no proposition had carried by a vote of a majority of the qualified voters of the county, held in the manner prescribed by the law. It was conceded by the court that the vote was not had in conformity with the law, and that the authority for the issuance would be wanting were it not for an underlying question, viz., Who should determine whether the election had been properly held? The court held that from the very nature of the case that duty devolved upon the Board; that to issue the bonds without first having ascertained this fact was a clear violation of duty; and that, having issued the bonds with a recital therein contained of having complied with the law, it was too late, even in a direct proceeding, to assert the want of authority to issue against a *bona fide* holder of the bonds. The recital in the bonds amounted to an *estoppel in pais*. The court say:

"Another answer to this ground of defense is, that the purchaser of the bonds had a right to assume that the vote of the county, which was made a condition to the grant of

power, had been obtained, from the fact of the subscription, by the Board, to the stock of the railroad company, and the issuing of the bonds.

"The bonds on their face import a compliance with the law under which they were issued.

"'This bond,' we quote, 'is issued in part payment of a subscription of two hundred thousand dollars, by the said Knox county, to the capital stock, &c., by order of the Board of Commissioners, in pursuance of the third section of an act, &c., passed by the General Assembly of the State of Indiana, and approved 15th January, 1849.' The purchaser was not bound to look further for evidence of a compliance with the conditions of a grant of power."

So in *Royal British Bank vs. Tarquand* it was said —and approved by this court upon several occasions:

"We may now take it for granted that the dealings with these companies (corporations) are not like dealing with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which, on the face of the document, appeared to be legitimately done."

And this doctrine, though applied to a private corporation, is held by this court to be applicable to municipal corporations.

In *Bissell vs. Jeffersonville*, 24 Howard, p. 287, the same doctrine is held, and *Knox vs. Aspinwall* cited and approved.

The defense in the Jeffersonville case was the failure to present to the city council a petition signed by three-fourths of the legal voters, asking that a certain subscription to a railroad be made, and the question was, Had the defendants the right to prove that fact by parol testimony? It was stated by the court that, "unless three-fourths of the legal "voters had petitioned, it is clear that the bonds were issued "without authority." But it was further held that the

determination of that question was left to the common council, the tribunal to which the petition was addressed; that by issuing the bonds they had determined in favor of the sufficiency of the petition, and that it was too late to raise that question against *bona fide* holders of the bonds.

In the case of *Moran vs. Miami County*, 2 Black., 722, the case of *Knox vs. Aspinwall* is again approved, and language used which admits of no misconstruction. And it is precisely in point in our case. The court say:

"In our leading case upon the subject, that of the *Commissioners of Knox County vs. Aspinwall et al.*, the suit having been brought for the interest due upon coupons annexed to one hundred and forty-two bonds, in which the main ground of defense was, that a board of commissioners had not power to execute them, and that on such account they were not binding upon the county of Knox, our answer and judgment was, that the bonds on their face import a compliance with the law under which they were issued; and that the purchasers of them were not bound to look further for evidence of a compliance with the conditions annexed to the grant of power to issue them."

After quoting at some length, and approving the case of *British Bank vs. Tarquand*, the court further say:

"But the real point in this case, as made by the counsel of the plaintiff in error, and sustained in argument by numerous adjudicated cases, was, that as it is declared in the bonds that they were issued by the Board of Commissioners of Miami county by order or resolution, pursuant to the statute authorizing the county to borrow money, passed at a regular meeting of the Board, to be used by the Peru and Indianapolis Railroad, payable to the company or bearer, for a loan to the county; that the *bona fide* holders, whether so by endorsement or delivery, had a right to infer that the bonds had been lawfully issued, by which the county of Miami is estopped in a suit for the recovery of the interest, from denying by pleas that its bonds had been issued to the Peru and Indianapolis Railroad for a loan of money to the county of Miami. We think and adjudge that the recitals in the bonds are conclusive, constituting an *estoppel in pais* upon the defendants in this suit."

It would be difficult to express a doctrine more forcibly, and we think it will be seen at a glance that it exactly decides the law of our case.

In *Gelpcke vs. City of Dubuque*, the court decide and refer to the Knox County case as also deciding that, "when a corporation has power, under any circumstan-"ces, to issue negotiable securities, the *bona fide* holder "has a right to presume they were issued under the "circumstances which gave the requisite authority, and "they are no more liable to be impeached for any in-"firmity in the hands of such a holder than any other "commercial paper."

And in *Mercer County vs. Hacket*, 1 Wall., 83, the court say:

"We have decided in the case of *Commissioners of Knox County v. Aspinwall*, that where the bonds on their face import a compliance with the law under which they were issued the purchaser is not bound to look further. The decision of the Board of Commissioners may not be conclusive in a direct proceeding to inquire into the facts before the rights and interests of other parties had attached; but *after* the authority has been executed, the stock subscribed, and the bonds issued and in the hands of innocent holders, it would be too late, even in a direct proceeding, to call it in question."

In *Rogers vs. Burlington*, 3 Wall., 654, the same doctrine is held.

In *Supervisors vs. Schenck*, 5 Wall., 772, the court again use the precise language last quoted, preceded by the words "the decision of this court is that when," &c. The court also say:

"Argument of the defendants proceeds upon the ground that if they can show that the order for the election emanated from the wrong source, the plaintiff, although an innocent holder for value, cannot recover; but it is clear that in a case like the present, where the power to issue the bonds was fully vested in the corporation, the proposition cannot be sustained.

On the contrary, it is settled law that a negotiable security of a corporation, which upon its face appears to have been duly issued by such corporation, and in conformity with the provisions of its charter, is valid in the hands of a *bona fide* holder thereof, without notice, although such security was in point of fact issued for a purpose, and at a place not authorized by the charter of the corporation."

In *City of Lexington v. Butler*, the court say:

"Holders of such instruments [municipal bonds] if the same are indorsed in blank or are payable to bearer, are as effectually shielded from the defense of prior equities between the original parties, if unknown to them at the time of the transfer, as the holders of any other class of negotiable instruments. Admitted, as it is, that the corporation defendants possessed the power to subscribe for the stock and to issue the bonds, it is plain that the plaintiff is entitled to recover upon the merits, as the repeated decisions of this court have established the rule that when a corporation has power under any circumstances to issue negotiable securities the *bona fide* holder has a right to presume that they were issued under the circumstances which gave the requisite authority, and that they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper."

In *Grand Chute vs. Winegar*—a case so peculiar in its hardship that relief would have probably been afforded if it could have been done without departing from the law so frequently laid down by this court—all the former decisions on the point were referred to, approved and followed, and the law again stated to be as held in *Meyer vs. The City of Muscatine*, "that if the legal au- "thority was sufficiently comprehensive, a *bona fide* holder "for value has a right to presume that all precedent "requirements have been complied with."

In *St. Joseph Township v. Rogers*, the court state, in stronger language than is used in the case itself, the force of the decision in *Knox County vs. Aspinwall*. The court say:

"*Knox County vs. Aspinwall:* Non-compliance with one of the conditions was clearly shown in that case, as the notices of the election as required by law had not been given in any form, but the decision was that the question as to the sufficiency of the notice and the ascertainment of the fact whether the majority of the votes had been cast in favor of the subscription, was necessarily left to the inquiry and judgment of the county board, as no other tribunal was provided for the purpose; and the court held that after the authority had been executed, the bonds issued, and they had passed into the hands of innocent holders, it was too late, even in a direct proceeding, to call the power in question, and that it was beyond all doubt too late to call the power in question to the prejudice of a *bona fide* holder of the bonds in a collateral way, which is attempted to be done in the case before the court."

In the course of the opinion, the case of the *Royal British Bank vs. Tarquand* is again referred to and approved. In the latter case it was held, this court say: "Want of authority to execute the bond, it was con- "ceded, would be an answer to the action, but it was "denied that a mere excess of authority by the directors "would have that effect, unless it appeared that the "plaintiff had knowledge of the fact."

In 11 Paige, 635, is a case in which the law on this subject in relation to private corporations is thus stated:

"A negotiable security of a corporation, which upon its face appears to have been duly issued by such corporation, and in conformity with the provisions of its charter, is valid in the hands of a *bona fide* holder thereof, without notice, although such security was in fact issued for a purpose and at a place not authorized by the charter of the corporation, and in violation of the laws of the State where it was actually issued."

This decision was cited and approved, held to apply as well to municipal as to private corporations, and the language above quoted embodied in the opinion of this court in the case of *Supervisors vs. Schenck.*

In *Coloma vs. Evans*, 3 Central Law Journal, p. 325, the court say:

"In the present case, the person or persons whose duty it was to determine whether the statutory requisites to a subscription and to an authorized issue of the bonds had been performed, were those whose duty it was also to issue the bonds in the event of such performance. The statute requires the supervisor or other executive officer not only to subscribe for the stock, but also, in conjunction with the clerk, to execute bonds to the railroad company in the name of the town for the amount of the subscription. The bonds were required to be signed by the supervisor or other executive officer, and to be attested by the clerk. They were so executed. The supervisor and the clerk signed them, and they were registered in the office of the Auditor of State, in accordance with an act requiring that precedent to their registration the supervisor must certify under oath to the Auditor that all the preliminary conditions to their issue required by law had been complied with. On each bond the Auditor certified the registry. It was only after this that they were issued. And the bonds themselves recite that they 'are issued under and by virtue of the act incorporating the railroad company,' approved March 24, 1869, 'and in accordance with the vote of the electors of said township of Coloma, at a regular election held July 28, 1869, in accordance with said law.' After all this it is not an open question as between the *bona fide* holder of the bonds and the township, whether all the prerequisites to their issue have been complied with. Apart from and beyond the reasonable presumption that the officers of the law, the township officers, discharged their duty, the matter has passed into judgment. The persons appointed to decide whether the necessary prerequisites to their issue had been completed have decided and certified their decision. They have declared the contingency to have happened, on the occurrence of which the authority to issue the bonds was complete. Their recitals are such a decision, and beyond those a *bona fide* purchaser is not bound to look for evidence of the existence of things *in pais*. He is bound to know the law conferring upon the municipality power to give the bonds on the happening of a contingency, but whether that has happened or not, is a question of fact, the decision of which is by the law confided to others, to those most competent to decide it, and which the purchaser is, in general, in no condition to decide for himself."

The same doctrine has been held in *Marcy vs. Oswego* and *Long vs. Humboldt*, and I certainly have a right to claim that they are conclusive in favor of the bonds in suit.

THE TOWNSHIP RECORDS.

If it were true that the purchaser is bound to look beyond the bonds to the records of the township to ascertain whether the bonds were voted and issued for a public purpose or not, such an examination, in this case, would not show that these bonds were issued for a private purpose.

The proposition submitted and voted on, as shown by the answer of the township, was to "aid in the con-"struction and completion and to furnish the *motive power* "*of a custom grist-mill* at the town of Burlington."

Now, a custom grist-mill may be either a steam or a water mill. While it is conceded that a steam mill is a private enterprise, it is true, both by legislative and judicial construction, that a water mill in Kansas is public, and may be aided by taxation. A brief review of the laws of Kansas, and the decisions of our courts in Kansas, will abundantly prove this.

Chapter 65, General Statutes of 1868, declares:

"SECTION 1. That all water, steam, wind, or other mills, whose owners or occupiers grind, or offer to grind, grain for toll or pay, are hereby declared public mills."

The other sections proceed to regulate mills, the rates to be charged, etc., and more effectually control mills than it was ever attempted in Kansas to control railroads. Chapter 66, General Statutes of Kansas, page 576, authorizes the taking of property for mill and mill-dam purposes by the exercise of the power of eminent domain.

The law under which the bonds in suit were issued authorizes aid to "water power."

This is the legislation of the State on the subject, and all of the laws above referred to were in force when these bonds were issued.

In 1871, the question as to the constitutionality of the mill-dam act was twice before the Supreme Court of Kansas, and in both cases the act was sustained by a unanimous court. (*Cross vs. Venard*, 7 Kas., 248; *Harding vs. Funk*, 7 Kas., 315.)

In the latter case, the question was elaborately argued by the court, and in the course of the opinion the following language was used by VALENTINE, J.:

"There is only one reason given why such an act is not in its nature and essence a law, and that reason is that such an act provides for taking private property for *private use*. We suppose that it will be admitted that, if the act does provide for taking private property for private uses *solely*, it is unconstitutional. On the other hand, we suppose it will be admitted, even by the plaintiff in error, that if the mill-dam act is authorized for a *public use* solely, that the act is constitutional. Now, if the mill is to be absolutely a private mill, the defendants in error would have no right to erect their dam, as the dam would in such a case be solely for a private use. The fact, however, is *that the mills provided for under our statute* (chapters 65 and 66, Gen. Stat., pp. 575 to 580) *are neither absolutely private mills, nor absolutely public mills, but they partake of the character of both. They might perhaps properly be called quasi public mills.*"

Previous to these decisions the Supreme Court had decided that bonds could constitutionally be donated to aid in the construction of railroads: *Leavenworth Co. vs. Miller*, 7 Kas., 479.

In that case the validity of legislation, authorizing the issue of such bonds, was sustained solely on the admitted fact, that a railroad could be aided by the power of

eminent domain. It was held, and correctly held, notwithstanding some opinions to the contrary, that, whenever an enterprise may be aided by eminent domain, it may be aided by taxation. Upon this subject the court say:

"We have the combined authority of every legislature, of every executive, and of every court in the United States, that the construction and operation of a railroad even in the hands of a (usually called) private corporation, is a public purpose; for if it were otherwise every lawyer in the land knows that the sovereign power of eminent domain could not be exercised in its favor. This ought to be conclusive of the question; but it is said it is not *such* a public purpose as will support taxation. Strange, indeed! The power of eminent domain is limited in its scope and operation to but few subjects. At every step it is traversed and opposed. Everywhere the plea of inexorable necessity must be interposed in its favor or its progress is ended. Not so with taxation. As we have already seen, taxation is the most universal broad-sweeping and unlimited power possessed by governments. It is the power to destroy, and has no limit except in the will of the sovereign (per MARSHALL, C. J., in *McCullough v. Maryland*, 4 Wheat., 316, 425 to 436). No instance has been shown or can be shown, where the government may aid a thing by the power of eminent domain, where it cannot also aid it by the power of taxation. No instance has been shown nor can be shown where the government may aid a thing by the exercise of any of its sovereign powers, where it may not also aid it by taxation. * * * Why this distinction is made in favor of the right of eminent domain and against the right of taxation, has never yet been shown and cannot be shown. If any distinction is to be made, it should be (as we think we have heretofore shown) the other way—against the right of eminent domain and in favor of taxation. How is it that a railroad is so eminently a public purpose that the homestead may be taken from the owner, and himself and family, his wife and little children, driven out of doors, houseless and homeless, in order that the homestead may be converted into a railway or depot, while at the same time the railroad partakes so little of a public character that one cent could not be levied as a tax to aid in its construction or operation? How is it that to take the homestead is constitutional and valid, and to be encouraged,

while to take the one-cent tax is unconstitutional, invalid, and an unwarrantable infringement upon public rights? Both are taken for the same purpose, to be applied to the same use, and to belong to and be controlled by the same corporation."

Further on the court, in answer to the *assumption* of council, that a mill may be aided by the power of eminent domain and not by taxation, say:

"If it were true that mills, bridges, ferries, &c., could be aided by the exercise of the right of eminent domain, and not by taxation, it would not at all follow as a logical sequence that everything else which could be aided by the exercise of the right of eminent domain could not be aided by taxation. But even if such would follow, still the premises upon which this supposed argument is founded are false, and therefore the conclusion may also be false. If these were merely private mills, private bridges, and private ferries, neither the right of eminent domain nor the right of taxation could be exercised in their favor; but if they are public, or *quasi* public, as a railroad is public, then there can be no sufficient reason given why both the right of eminent domain and the right of taxation may not be exercised in their favor."

And on the general question as to the right of the legislature to declare what purposes are public, the court say:

"As to what is such a public benefit that it may be aided by the public, seems to be a question of public policy — of political economy — which must almost exclusively be determined by the legislature. And when the legislature have determined the question — when they have determined that a certain thing is of great public benefit, that it is public policy to aid it by taxation, if the courts may still say that such is not public policy, and for that reason declare the act of the legislature unconstitutional, the courts must possess almost despotic power. If such is correct doctrine, then there is an appeal from the legislature to the courts on mere questions of policy."

I think that, conceding that a steam mill is a private purpose, I have abundantly shown that a water mill is

in Kansas a public enterprise, and may be aided by taxation. And as the legal conclusion therefrom I submit this proposition, assuming that the purchaser is bound to take notice of the record set out in the answer of Burlington Township:

"*That the expression 'motive power of a custom grist-mill,' is equally descriptive of a steam mill and a water mill — a public enterprise and a private one; one that could, and one that could not, be constitutionally aided by the issue of bonds under the law of 1872, and this legal proposition, logically, follows in my judgment:*

"*That where the authorities issuing, and the people voting for the issue of, bonds, use, in the order for, and the proclamation of, an election, a phrase, which with equal accuracy describes both a public and a private enterprise — an enterprise which may, and one which may not, be constitutionally aided; a work, for the aiding of which there is a valid statutory authority, and one for which there is no such authority — and bonds are issued, reciting a public purpose, the innocent holder thereof, without actual notice of the real purpose of their issue, is entitled to the conclusive presumption of law, that they were issued for the public, not the private, purpose; for the purpose authorized by law, not the purpose unauthorized; that the officers of the township issued bonds which the law said they might issue, not bonds which the law prohibited them from issuing.*"

REGISTRATION.

These bonds were duly registered in the office of the Auditor of State.

Sometime it will be necessary for the courts to determine what effect, if any, the certificate of registration has as a recital. I therefore repeat here the argument I made on this point in the case of *Marcy vs. Oswego Township.*

THE REGISTRATION LAW.

If the general law applicable to negotiable bonds, heretofore cited, does not effectually deprive the makers of such bonds of the defense set up against *bona fide*

holders, we have a statute law which does. This is known as the registration law, and was passed in 1872. It is on page 110, chapter 68, Laws of 1870. One peculiar feature of it was inserted for the express purpose, apparently, of evading the force of decisions of this court. It was known, of course, that whatever the general rule as to the negotiability of municipal securities might be, the State, which authorized their issue, had the right to declare, by express enactment, that they could only be negotiable upon compliance with certain conditions. This right the State exercised by declaring in the registration law that bonds issued under its provisions "shall not bear interest or be negotiable "until after the delivery and registration thereof."

This law was not passed until long after our bonds were issued and in *bona fide* holders' hands; but it was made the privilege of such holders to avail themselves of its provisions. It was passed, we say, to meet the very decisions we have cited, as a comparison between the law and the views of the courts on the subject of the negotiability of bonds will abundantly show. The rule that a municipality, by reciting in its bonds a compliance with the law authorizing their issue, was estopped to deny the regularity of their issue as against an innocent holder, was acknowledged to be sound; but it was thought inequitable and hard in many cases, and it was determined by statute law to avoid this rule, and to appoint some higher officer than county officials to examine all bonds sought to be put upon the market, for the purpose of determining their regularity and legality. Without his sanction, no act of the parties issuing them, no recitals, could create an estoppel: with his sanction they went upon the market

purged of all infirmities, with all prior equities cut off; or rather with an adjudication, under no circumstances to be impeached collaterally, that no prior equities existed. Hence the registration law, and the provision quoted.

The two sections of that law material to this inquiry are as follows:

"SEC. 14. Within thirty days after the delivery of such bonds, the holder thereof shall present the same to the Auditor of State for registration, and the Auditor shall, *upon being satisfied that such bonds have been issued according to the provisions of this act*, and that the signatures thereto of the officers signing the same are genuine, register the same in his office, in a book to be kept for that purpose, in the same manner that such bonds are registered by the officers issuing the same, and shall, under his seal of office, certify upon such bonds *the fact that they have been regularly and legally issued;* that the signatures thereto are genuine, and that such bonds have been registered in his office according to law; for which registration and certificate the Auditor shall be entitled to a fee of one dollar for each bond so registered, to be paid by the holder thereof.

"SEC. 15. That the holders of bonds heretofore issued, or that may hereafter be issued, in pursuance of any contract heretofore made, under any law of this State, may have the benefits of this act, by having such bonds registered in the office of said Auditor of State, as provided herein, for the registration of such bonds [issued] by virtue hereof. It shall be the duty of the Auditor of State, upon the registration of any bonds not issued under the provisions of this act, within ten days thereafter, to notify the officers issuing the same of such registration, which fact shall be entered by such officers in a book wherein the record of such bonds is kept, and such bonds shall thereafter be considered registered bonds."

If this law means anything, it means what we have said. It was intended to add to the value of our bonds by affording protection both to the bondholder and the municipality issuing bonds. If registered, the bonds, in *bona fide* hands, are protected against the defense of prior equities; if unregistered, the counties are not estopped to deny the validity of the bonds, in whosesoever hands they may be.

The certificate on these bonds, which is in strict conformity with the law, reads as follows:

"I, A. Thoman, Auditor of the State of Kansas, do hereby certify that this bond has been regularly and legally issued; that the signatures thereto are genuine, and that such bond has been duly registered in my office in accordance with an act of the Legislature, entitled 'An act to authorize counties, incorporated cities and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, or other works of internal improvement, and providing for the registration of such bonds, the registration of other bonds, and the repealing of all laws in conflict therewith,' approved March 2, 1872.

"Witness my hand and official seal, this 29th day of May, 1872.

{Seal of the Auditor of State. Kansas.—Jan. 29, 1861.} A. THOMAN, *Auditor of State.*"

It will be admitted that the power which could create townships, and invest them with authority to issue bonds, could also delegate to any officer of its selection the power to determine whether any bonds thus issued had been issued in compliance with the law, with *all* the requirements of the law. This has been done, and we think the Auditor's certificate is conclusive, that the purchaser of bonds is not bound to look further.

In the Jeffersonville case, where the grant of power was limited by certain conditions, compliance with which was essential to the right to execute the power, it was held that the question whether these conditions, necessary to give jurisdiction of the subject-matter, had been properly complied with, was left to the determination of the very Board executing the power "because no other was designated." Here there is a grant of power with conditions precedent to its exercise, compliance with which is essential to give jurisdiction of the subject-matter; and the law which confers the power expressly designates the officer whose duty it is to determine whether all the conditions have been complied with regularly and legally. It authorizes the Auditor to settle the question definitely, judicially. It is not a mere ministerial duty, requiring the exercise of no discretion.

It permits him to investigate, to hear evidence, to satisfy himself; and it only becomes his duty to register bonds when he has become "satisfied that such bonds have been "issued according to the provisions of the law." His action, then, is final. It cannot, at least, be collaterally impeached. His certificate creates an estoppel against the municipality whose duly constituted agent he is. Registered bonds go upon the money markets of the East with the sanction of the State itself. They bear upon their face the statement, under the seal of the State, that the State which granted authority to issue bonds under certain conditions, has, by its appointed agent, examined the acts performed and the bonds issued in pursuance of such authority, and declares, as the result of such examination, that the authority has been legally exercised, that all the conditions precedent have been regularly and legally complied with!

Surely, if this does not authorize a prudent man to purchase bonds without looking further, there is no force in the repeated decisions of this court.

It may be asserted as a matter of general notoriety, that such is the effect in fact of registration. The only question buyers in the Eastern markets ask is, Are the bonds registered? If they are, they look no further; if not registered, they will have nothing to do with them.

It was the intention of the law to produce just this feeling; to make the buyer secure if bonds were registered; to make bonds unmarketable if not registered.

If any weight is to be attached to the repeated decisions of courts as to the law generally governing securities of this kind, and the express statutory provisions on the same subject, we must recover in this case.

If a recital in a bond that the law has been complied with, backed up by the certificate of a State officer duly authorized to examine the proceedings upon which the validity of the bond depends, that the law has been in all things complied with, and the bond regularly and legally issued, can create an estoppel, then one exists here; and no defense, resting upon an alleged failure to regularly comply with one of the conditions annexed to the grant of power, can be sustained against a *bona fide* holder of the bonds.

A. L. WILLIAMS,

Attorney for Defendant in Error.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~565.~~ 1044

THE UNITED STATES, PLAINTIFFS IN ERROR,

vs.

ANNIE FOX, JOSEPH FOX, GEORGE FOX, BENJAMIN N. DISBROW, DAVID HAYS, AND A. H. BRUMMEL.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

FILED OCTOBER 8, 1874.

SUPREME COURT OF THE UNITED STATES

No. 565.

THE UNITED STATES, PLAINTIFFS IN ERROR,

vs.

ANNIE FOX, JOSEPH FOX, GEORGE FOX, BENJAMIN N. DISBROW, DAVID HAYS, AND A. H. BRUMMEL.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

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UNITED STATES OF AMERICA:

The President of the United States of America to the honorable the judges of the court of appeals of the State of New York, to the honorable the judges of the supreme court, county of New York, and to the surrogate of the county of New York, greeting:

Whereas in the record and proceedings, as also in the rendition of a judgment of a plea, which is in the said court of appeals before you, or some of you, being the highest court of law and equity of said State in which a decision could be had in the said suit between the United States of America, plaintiff, and Annie Fox, Joseph Fox, George Fox, Benjamin N. Disbrow, David Hays, and A. H. Brummel, defendants, wherein was drawn in question the validity of an authority exercised under the United States, to wit: The authority of the Secretary of the Treasury, or other proper officer of the United States, to receive, on behalf of the United States, the property, real and personal, bequeathed and devised to the United States by one Charles Fox, now deceased, and the decision was against the validity of such authority; and wherein was drawn in question the validity of a statute of the State of
2 New York, as against the United States, on the ground of its being *repayment* to the Constitution of the United States, and the decision was in favor of its validity;

And wherein was drawn in question the construction of the Constitution of the United States, in respect to its authorizing the said United States to take real estate devised to it, and the decision was against the title to said real estate set up and claimed under said Constitution and said will, a manifest error hath appeared, to the great damage of the said United States, as by its complaint appears; we being willing that the error, if any hath been, should be duly corrected, and full and speedy justice be done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court then and there to be held, that the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and
3 customs of the United States should be done.

Witness the honorable Nathan Clifford, associate justice of the said Supreme Court, this thirteenth day of October, in the year of our Lord one thousand eight hundred and seventy-three.

[SEAL.] KENNETH G. WHITE, *Clerk*, &c.

4 (Indorsed:)
Within writ allowed.

WARD HUNT,
Asso. Just. Sup. Ct. U. S.

Filed Dec. 9, 1873.

5 UNITED STATES OF AMERICA:

To Annie Fox, Joseph Fox, and George Fox, Benjamin N. Disbrow, David Hays, and A. H. Brummell, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washing-

ton, on the second Monday of October next, pursuant to a writ of error filed in the office of the clerk of the supreme court, county of New York, at the city of New York, wherein the United States of America are plaintiffs in error and you are defendants in error, to show cause, if any there be, why a judgment in the said writ of error mentioned should not be cancelled and speedy justice by done to the parties in that behalf.

Witness the Hon. Ward Hunt, justice of the Supreme Court of the United States, at Washington, this tenth day of December, one thousand eight hundred and seventy-three.

WARD HUNT,
Associate Justice Sup. Court U. S.

6 (Indorsed :) U. S. Supreme Court. The United States of America vs. Annie Fox et al. Citation. Edwards Pierrepont, of counsel for plaintiffs in error. John M. Corney, attorney for plffs. in error.

Due and timely service of within citation is hereby admitted.

Dated New York, Dec. 12, 1873.

PINCKNEY & SPINK,
Attys. for the Exrs., Hays & Brummell.
J. SOLIS RITTERBAND,
Atty. for the Executors.
JAS. FLYNN,
Atty. for Guardian ad litem of Infant Respondents, Anne Fox, Joseph Fox, & George Fox.

7 Supreme Court of the United States, of October term, in the year of our Lord one thousand eight hundred and seventy-four.

THE UNITED STATES OF AMERICA
vs.
ANNIE FOX ET AL.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States at the capital, in the city of Washington, come the Attorney-General of the United States and Edwards Pierrepont, special counsel of the United States on behalf of the said United States, and say that in the record and proceedings aforesaid there is manifest error, in this, to wit, that by the record aforesaid it appears that the right of the United States to take and hold the real estate devised to the United States by one Charles Fox, now deceased, and the authority of their proper officer to receive said real estate on their behalf were called in question, and the decision was against such right and such authority, whereas it should have been in favor of such right of the United States, and such authority of its

8 proper officer; there is also error in this, to wit, that it further appears in the record aforesaid that the validity of a certain statute of the State of New York, as against the United States, as construed by its courts, was drawn in question on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of said statute as construed, and to the effect that the United States, a sovereign body politic, cannot receive and hold the said real estate devised as aforesaid, whereas the said decision should have been against the validity of said statute so construed and in favor of the United States; there is also error in this, to wit, that it appears by the record aforesaid that there was drawn in question the construction

of the Constitution of the United States in respect to its authorizing the said United States to take real estate devised to them, and the decision was against such authority and against the title of the United States to the real estate devised as aforesaid, whereas the said decision should have been in favor of such authority and sustaining the title of the United States to said real estate; there is error also in this, to
9 wit, that by the record aforesaid it appears that the will of said Charles Fox, deceased, devising real estate as aforesaid, was decreed invalid and void as to real estate, whereas it should have been decreed a valid will of real estate; there is error also in this, to wit, that it appears by said record that it was adjudged and decreed that the United States of America is not entitled to and cannot lawfully take, receive, hold as devisee in trust or otherwise, under said last will and testament, the real estate devised thereby or any part thereof, whereas said decree should have been in favor of said The United States; and there is error also in this, to wit, that it was decreed that the real estate of said Charles Fox descends to his heirs at law; and there is also error in this, to wit, that the said will was admitted to probate as a will of personal estate only, whereas it should have been admitted as a will of both personal and real estate; there was error in not holding that the said real estate was, by the operation of the provision of the said will and of the law, as intended by the testator, converted into personal estate and paid to the United States as such.
10 And the said Attorney-General and the said Edwards Pierrepont, special counsel of the United States, in behalf of said United States, prays that the judgment aforesaid may be reversed, annulled, and altogether held for nought, and that the said United States may be restored to all things which they have lost by occasion of said judgment.

GEO. H. WILLIAMS,
Atty. General.

EDWARDS PIERREPONT,
Special Counsel.

(Indorsed:) Supreme Court of the United States. The United States of America vs. Annie Fox et al. Assignment of errors.

11 The answer of the judges of the supreme court of the State of New York, for the first judicial district, the same being a court of record.

A transcript of the record and judgment of this court, together with all things touching or in any wise concerning the same.

We certify under the seal of our said court to the justices of the Supreme Court of the United States as within it is commanded.

By the court:
[SEAL.] WM. WALSH, *Clerk.*

12 Court of appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals held at the capital, in the city of Albany, on the 6th day of May, in the year of our Lord one thousand eight hundred and seventy-three, before the judges of said court.

Witness the Hon. Sanford E. Church, chief judge, presiding.
E. O. PERRIN, *Clerk.*

the debt contracted by the war for the subjugation of the rebellious Confederate States, the property located on Third avenue, viz, the front house and lot known as No. 515 Third avenue, and the four-story house on the rear of said lot, also known as No. 515 Third avenue; likewise I give and bequeath the house and lot No. 517 Third avenue; all my piece of land on Fisk avenue, in Queens County and town of Newtown, consisting of or containing $1\frac{49}{100}$ acres; also forty acres of land in the State of Iowa, Lime County, location N. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$ 9.86 6.40 acres; likewise the one-half of house and lot No. 15 Pitt street; also the one-half of forty acres of land located by my mother in Lime County, State of Iowa, S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ 7.86 5.40 acres; likewise I make, constitute, and appoint David Hays and A. H. Brummell to be executors of this my last will and testament, hereby revoking all former wills by me made.

In witness whereof I have hereunto subscribed my names and affixed my seal.

CHARLES FOX. [L. S.]

The above written instrument was subscribed by the said Charles Fox, in our presence, and acknowledged by him to each of us, and he, at the same time, published and declared the above instrument so subscribed to be his last will and testament, and we, at the testator's request, and in his presence, have signed our names as witnesses hereto, and written opposite our names our respective places of residence.

A. H. BRUMMELL,
416 *Grand Street, N. Y.*
DAVID HAYES,
258 *Henry Street.*

JULY 16TH, 1864.

19 The people of the State of New York, by the grace of God free and independent, to Eliza Jane Alphonse, of full age, residing in the city of New York, and Anne Fox, Joseph Fox, and George Fox, minors residing with their mother in the city of Brooklyn, New York, B. N. Disbrow, of Yorktown, Westchester County, being their general guardian, the heirs and next of kin of Charles Fox, deceased, send greeting:

Whereas the United States of America, by Edwards Pierrepont, U. S. district attorney for southern district of New York, has lately applied to our surrogate of the county of New York, to have a certain instrument in writing, relating to both real and personal estate, duly proved as the last will and testament of Charles Fox, late of the city of New York, deceased; therefore you, and each of you, are cited to appear before our said surrogate, at his office, in the city of New York, on the 26th day of February, instant, at ten o'clock in the forenoon of that day, then and there to attend to the probate of the said last will and testament.

In testimony whereof, the surrogate of our said county has hereunto affixed his seal of office, the 12th day of February, one thousand eight hundred and seventy.

[L. S.] MORGAN A. DAYTON, JR.,
Clerk to the Surrogate's Court.

CITY AND COUNTY OF NEW YORK, *to wit:*

John C. Keating, of said city, being duly sworn, says that he made

personal service of the foregoing original citation on the following-
20 named persons, in said citation mentioned, by exhibiting to each of them the said original citation, and delivering to each of them a copy thereof, as follows, that is to say, on the said Eliza Jane Alphonse, on the 15th day of February, 1870, and on Anne Fox, Joseph Fox, and George Fox, on the 16th day of February, 1870.

JOHN C. KEATING.

Sworn to this 21st day of February, 1870, before me,

WM. W. SMITH,
Assistant to Surrogate.

CITY AND COUNTY OF NEW YORK, *ss:*

Benjamin Disbrow, of Yorktown, in the county of Westchester, being duly sworn, says that he hereby admits of due and timely service of the within citation, and waives any irregularity in the mode thereof.

BENJ. N. DISBROW.

Sworn to before me, this 26th day of February, 1870.

MORGAN A. DAYTON, JR.,
Assistant to Surrogate.

21 Surrogate's court, county of New York.

IN THE MATTER OF THE PROBATE OF A PAPER-writing propounded as the last will and testament of Charles Fox, deceased.

Before Hon. R. C. Hutchings, surrogate.

For proponents and legatees, the United States of America, John M. Cooney, proctor; Edwards Pierrepont, of counsel.

For executors, J. Solis Ritterband and Pinckney & Spink, proctor and counsel.

For infant contestants, Anne Fox, Joseph Fox, and George Fox, Benjamin N. Disbrow, guardian ad litem; James Flynn, proctor for guardian ad litem; A. J. Vanderpoel, of counsel.

22 At a special term of the supreme court, held at chambers thereof, at the court-house, in the city and county of New York, on the 14th day of November, 1871.

Present, John R. Brady, justice.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
ANNE FOX, JOSEPH FOX, GEORGE FOX, BENJAMIN N. DISBROW, DAVID HAYS, and A. H. BRUMMELL, respondents. } Supreme court.

On reading and filing the petition of Benjamin N. Disbrow, one of the above-named respondents, and general guardian of the above-named respondents, Anne Fox, Joseph Fox, and George Fox, minors, under the age of fourteen years, and on motion of James Flynn, attorney for said petitioner, ordered that Benjamin N. Disbrow, residing at Brooklyn, in the county of Kings, be, and is hereby, appointed guardian ad litem of the said Anne Fox, Joseph Fox, and George Fox, for the special purpose of taking charge of the rights and interests of said infants,

and of each of them, on the appeal herein, and to protect and defend the same, on his executing to the people of this State, and duly acknowledging and filing, a bond in the penalty of five hundred dollars, with one sufficient surety, to be approved by a justice of this court, and conditioned as required by the statute and practice of this court.

A copy.

CHAS. E. LOEW, *Clerk.*

23 60 WALL STREET, NEW YORK, *Feb.* 16, 1870.

Hon. ROBERT C. HUTCHINGS,
Surrogate of the City and County of New York:

SIR: I hereby notify you, and all others concerned, that I appear as attorney and counsel for B. N. Disbrow, esq., guardian of Anne Fox, Joseph Fox, and George Fox, minors and heirs at law of Charles Fox, late of said city and county, deceased, to contest in their behalf, and I do hereby contest, the validity of the alleged last will and testament of said deceased, offered for probate before you, also that I object to the admission thereof.

Very respectfully,

JAS. FLYNN.

DAVID HAYS, called for proponents:

(Counsel for special guardian objects to the witness on the ground that he is incompetent, being an executor. Objection overruled. Exception taken.

Counsel for special guardian raises the further objection that the statute excludes witness under the term "appointment." Objection overruled. Exception taken.)

Witness sworn.

Direct examination by Mr. Ritterband:

Q. Where do you reside?
A. I reside at present in East Sixty-fifth street.
Q. Where do you do business?
A. No. 207 Division, corner of Clinton, in the city of New York.
24 Q. How long have you done business at 207 Division street?
A. Fifteen years.
Q. Did you know Charles Fox in his life-time?
A. I did.
Q. How long had you known him prior to 1864?
A. Several years.
Q. Do you know where he lived in 1864? and, if so, state it.
A. He lived in Pitt street, near Grand; I don't know the number.
Q. In this city?
A. Yes, sir.
Q. That is in your neighborhood?
A. Yes, sir.
Q. Did you see him frequently during the year 1864?
A. Very frequently.
Q. Do you recollect seeing him in the month July of that year?
A. Yes, sir.
Q. Look at that paper, and say if you ever saw it before? (the one propounded.)
A. Yes, sir.
Q. Do you recollect when and where you first saw it?

A. I saw that paper in Mr. A. H. Brummell's store, in Grand street, in this city.

Q. Who is Mr. Brummell?

A. He is the other witness.

Q. Look at that signature "Charles Fox;" did you see that written there?

A. Yes, sir.

Q. By whom?

A. Charles Fox.

Q. Can you state when you saw it written?

A. I could not positively; I think it was about this time in July—July 16th, 1864.

Q. Is that the date you find on the will?

25 A. Yes, sir.

Q. Where did you see that signature written?

A. In Mr. Brummell's store in Grand street, this city.

Q. Who was present?

A. Mr. Brummell, myself, and Mr. Fox.

Q. At the time that Mr. Fox signed that will, did he say anything about it? and if so, state what he said.

A. He said it was his last will and testament.

Q. Anything else? did he make any request?

A. He requested us to be witnesses to his last will and testament.

Q. Whom?

A. Mr. Brummell and myself.

Q. Requested you to be witnesses?

A. Yes, sir.

Q. That was at the time he signed it?

A. Yes, sir.

Q. What did you do then?

A. I signed my name after Mr. Brummell.

Q. As a witness?

A. As a witness.

Q. What did Mr. Brummell do, if anything?

A. Mr. Brummell signed at the same time.

Q. Is that your signature?

A. That is my signature.

Q. Was Mr. Fox present when you and Mr. Brummell signed the paper?

A. Mr. Fox was present.

Q. Did you see Mr. Brummell sign it?

A. I did.

Q. Did Mr. Brummell see you sign it?

A. I presume he did.

Q. About how old was Mr. Fox at this time?

A. He was in the neighborhood of fifty years—maybe a little over.

Q. What was the condition of Mr. Fox's mind at the time he executed this instrument?

(Objected to; objection overruled; exception taken.)

26 A. Perfectly sound.

Q. Did you observe any indication of undue influence or restraint at the time he signed it?

A. I did not.

Cross-examination by Mr. Flynn:

Q. Do you know who wrote this instrument?

A. No, sir,
Q. How did you happen to meet in that store; were you sent for?
A. I went with Mr. Fox, at his request, to Mr. Brummell's store to sign the will.
Q. Who was present besides yourself, Mr. Fox, and Mr. Brummell?
A. No one that I know of; I don't know of any one but us three.
Q. You say you saw him sign the will?
A. I saw Mr. Fox sign his will.
Q. And what did he say then?
A. He wanted us to be witnesses to his last will and testament.
Q. What did he say?
A. He said it was his last will and testament.
Q. What did he do then; had he signed before or after that?
A. He signed his name and we signed as witnesses.
Q. Was he present when you signed the paper?
A. He was present.
Q. Did he see you?
A. I presume he did.
Q. Was he in the store?
A. He was by, present. I said that before.
Q. Will you swear that he did or could have seen you sign your name?
A. I will swear that he was by when we signed.
Q. Will you swear he did or could have seen you when you signed your names?
A. Yes, sir.
27 Q. You stated he was perfectly sound; tell us how you know that. Are you a doctor?
A. No, sir.
Q. Tell us how you know he was perfectly sound.
A. We knew it; it's the way we judge people generally. I saw nothing unsound about the man.
Q. That is the only way you knew?
A. That is the only way; did not examine him.
Q. What did he do in relation to this will at the time he executed it, besides asking you to witness it?
A. That it was his last will and testament.
Q. Did he say anything in reference to the fact that he gave his propperty to the United States Government?
A. No, sir.
Q. Do you know what the will contained at the time you signed it?
A. No, sir.
Q. Had he said anything at all at that meeting about any of his relatives; do you recollect his saying anything?
A. No, sir; not at that meeting.
Q. What was done with the will after he signed it?
A. He gave the will to me after if was signed, in an envelope.
Q. How long did you keep it?
A. It was in my office two years—in the neighborhood of two years.
Q. He took it away subsequently?
A. Yes, sir.
Q. What did he say when he took it away?
A. He said he would make some alterations in it and return it.
Q. You had not seen any will of his subsequent to this?
A. No, sir.

28 Q. Do you know whether he made any other will subsequently?

A. No, sir.

Q. Have you ever heard him say anything, at any time, in relation to any member of his family?

(Objected to as immaterial. Question withdrawn.)

Q. Have you ever heard him say he would not leave a dollar of his property to any member of his family?

(Objected to. Question waived for the present.)

Q. How long before he came to this store, with this will, did you know he had made a will?

A. A moment before. As he came in the store, he told me he had made the will.

Q. At the time of the execution of this will, could you tell us the language that was used there?

(Objected to, that the question has already been answered.)

Q. Could you tell the exact language that was used?

A. No, sir; no more than one part of the language; what other was spoken about I have no recollection.

Q. Have you been spoken to in relation to your testimony that you are to give here in relation to this matter?

A. No, sir.

Q. You have not spoken to any one about it?

A. No, sir.

29 ADONIJAH H. BRUMMELL, called for proponent.

Direct examination by Mr. Ritterband:

Q. Where do you reside?

A. My residence now is 231 Henry street.

Q. Where is your place of business?

A. No. 416 Grand street.

Q. Where was it in the year 1864, in the month of July?

A. At the same place, same number, and same street.

Q. No. 416 Grand street, in this city?

A. Yes, sir.

Q. Did you know Charles Fox in his life-time?

A. Yes, sir.

Q. Did you know him in July, 1864?

A. Yes, sir.

Q. How long had you known him previous to 1864?

A. Well, several years—four or five years.

Q. Did you see him in the month of July, 1864?

A. Yes, sir.

Q. Did you see him on the 16th of July, 1864, or about that time?

A. About that time.

Q. Where did you see him?

A. In my store.

Q. Look at that paper (the one propounded) and say whether or not you have ever seen it before?

A. Yes, sir; I have seen this paper before.

Q. Can you state when, and where, you first saw it?

A. I think the first time I saw it was in my store.

Q. When; what year?

A. It was about the date of the will, July 16th, 1864.

30 Q. Look at the signature opposite the seal—"Charles Fox"—did you see that written?

A. I think I did.
Q. By whom?
A. Charles Fox.
Q. When and where?
A. In my store, on the 16th of July, 1864, at the time we signed.
Q. Who else was present at the time besides yourself and Mr. Fox?
A. Mr. David Hays, the other witness.
Q. Did Mr. Fox come to your store with Mr. Hays?
A. He came there with Mr. Hays.
Q. State what he said at the time he signed that will.
A. He said that it was his last will and testament, and asked us to be witnesses to it—subscribing witnesses to his last will and testament—and we gave our consent and done so.
Q. Did he sign it then?
A. He did, to the best of my recollection.
Q. Did you sign it?
A. Yes, sir.
Q. Is that your signature?
A. Yes, sir.
Q. Were Mr. Fox and Mr. Hays present when you signed it?
A. Yes, sir.
Q. Did you sign it in the presence of Mr. Fox and Hays?
A. Yes, sir; we were all together.
Q. Did you see Mr. Hays sign it?
A. Yes, sir.
Q. What was the condition of Mr. Fox's mind at the time he executed that instrument?
A. I considered his mind sound—that he was a sane man.
Q. Did you observe any indication of undue influence or restraint, at the time he signed it?
A. No, sir; not at all.

31 Cross-examination by Mr. Flynn:

Q. Will you swear you saw him write his name there?
A. Yes, sir.
Q. And he requested you to be witnesses?
A. Yes, sir.
Q. And he acknowledged it to be his last will and testament?
A. Yes, sir.
Q. Have not you stated since the decease of this man, Fox, that he was insane?
A. No, sir.
Q. You have not?
A. No, sir.
Q. To anybody?
A. I said no.
Q. Did not you state to George K. Chase that he was insane?
(Objected to; objection overruled; exception taken.)
A. No, sir.
Q. Will you give us your reason for believing that he was sane?
A. By talking with him, being acquainted with him some years. I considered him considerably above ordinary men in the way of intelligence. I never had the slightest idea that the man was insane at all.
Q. Did he talk about the devise of this will at the time he made it?
A. Not to me.
Q. Did he talk over the subject of the will—the devise to the Government?

A. No, sir; not to me.
Q. Do you know whether or not he made a subsequent will?
A. I don't know.
32 Q. Did he tell you so?
A. No, sir; he never told me anything about it.
Q. Did you tell Mr. George K. Chase that Mr. Fox informed you that he had made a subsequent will?
A. I don't know as I am acquainted with George K. Chase. I may know him, but I don't remember.
Q. Since the decease of Mr. Fox, did you tell Mr. George K. Chase that Mr. Fox had made a subsequent will in writing?
A. No.
Q. Did Mr. Fox tell you that this will was destroyed?
A. No, sir; he never told me that the will was destroyed.
Proponent rests.

Adjourned until Monday, March 7th, 1870, at two o'clock.

NEW YORK, *March* 7, 1870.

EPURAZYRA MURAWSKI, called for contestant, sworn.

Direct examination by Mr. Flynn:

Q. Where do you reside?
A. No. 553 Third avenue; the old number was 517.
Q. One of the houses owned by Mr. Fox?
A. Yes, sir.
Q. Did you know Charles Fox in his life-time?
A. I have known him going on thirteen years.
Q. How long have you been a tenant of him?
A. Going on thirteen years.
Q. Were you well acquainted with him?
A. Yes, sir; he used to be in my place most of the time.
33 Q. Have you had a number of conversations with him?
A. Many times.
Q. From your acquaintance and conversation with Mr. Fox, in the spring of 1864, or at any time previous, did you know of any facts or circumstances happening about that time which led you to form any opinion respecting his sanity?
(Objected to.)
Q. Will you describe his conduct then?
A. Yes, sir.
Q. What was it?
A. This was before 1864?
Q. Yes.
(Objected to as being too remote from the making of the will.)
Q. In the spring of 1864, or about that time?
A. Yes, sir. Shortly before he moved up town he came into my store one day. He seemed to be very much alarmed; said that a set of thieves was coming into his place at night, and stood in the corner of his room, and watching for him a couple of hours. He said he lived in Pitt street. Then he watched for them with his gun in his hand, and he fired, and he found that it was a cat running along the yard.
Q. Anything else about that time?
A. About that time I don't remember anything more, with the exception when he moved up town he had a great many ways about him. He would come in sometimes screaming and hallooing, and would rush

out again, and come back as good as he was before; and he came into a lady's room up stairs, one time, to collect her rent.

Q. (By the surrogate.) Were you present?

34 A. Yes, sir; and he hallooed "murder." All our neighbors came out. He said the woman locked him in her room.

Q. Did she lock him in her room?

A. She did not—just shut the door; he came out in the hall and hallooed, "Murder."

Q. Do you recollect anything about a ghost story that he used to tell?

A. Yes, sir.

Q. What about that?

A. He told me one time he walked as far as the Cooper Institute some years ago, and he fell asleep.

Q. How long ago was it?

A. That was the same time when he was telling the story.

Q. How many years ago.

A. About six or seven years ago; it must be at least that. Before he moved up town, when he lived in Pitt street, this happened. He fell asleep and slept there; he did not know whether a couple of hours or more. When he waked up he found there was a big grave dug right alongside of him, and an old gentlemen came along and told him he was lost, and he fetched him in the straight road to go to Division street—with long white hair. He never seen the man before.

Q. Do you know anything about a cat that he used to hold conversation with in Pitt street?

A. He used to tell that to my children—that he used to have a cat climb up a pole.

Q. Were you present?

A. Yes, sir.

Q. Did he appear to be in earnest?

A. We did not know what to make of the man talking to the children; the cat tried to talk to him.

Q. What did he say to the cat?

A. He said the cat had no teeth, and it was fairly talking to him; it would climb up a pole, and it stood on the top of the pole, the cat trying to talk to him.

Q. Do you know anything in connection with a water-closet;

35 A. Yes, sir; he used to come there and get a pole and get all the papers we could give him, and work there very hard himself? papers to light the papers down in the water-closet, and work there very hard himself with the poles.

Q. Work at what?

A. At the sewer with the poles.

Q. Will you describe his general appearance—how he looked at this time?

A. He looked frightful to me; he frightened me many times—all my children and every one else in the house. A couple of hours afterward he came in as good-natured again.

Q. Did you ever hear him say anything in relation to his brother James and his family?

A. I did.

Q. What was that?

A. He told me that he had made his will, but he would not leave his relations anything.

(Objected to. Objection overruled.)

Q. Do you recollect anything else happening about that time?
A. He came in shortly and wanted me to buy my child a pair of new shoes, and he would put new soles on them.
Q. They were new shoes then?
A. On to new shoes.
Q. Do you remember his taking your child off one time?
A. Yes, sir; he took her to the Academy of Art—the child was about eight years old—and left her there about a couple of hours all alone.
Q. Do you recollect anything else?
A. On the sidewalk he went on his knee, and a man drove up with a chaldron of coke and put it on the sidewalk, and he went on his
36 knees, finding whether the pavement broke. He run in screaming and told me to move. That was after I paid my rent, on the first of February.
Q. There is a photograph gallery next to you?
A. Yes, sir.
Q. Did he say anything about allowing persons to stand on the sidewalk?
A. Yes, sir; he wanted me to find some fault with it, and he would go and get a dispossession against the people next door.
Q. For what reason?
A. Because they stood on his stoop and were wearing off his stoop.
Q. The people looking at the pictures?
A. Yes, sir; he felt quite angry because I would not say yes.
Q. From those facts, what did you conclude in relation to him?
(Objected to and waived.)
Q. From those facts and the language which you have described, was he, in your opinion, in his right mind or not?
(Objected to; objection overruled; exception taken.)
A. We never took him to be right, or he would not have acted in the way he did towards us.
Question repeated.
A. I always thought he was not in his right mind, from the way he acted.

Cross-examination by Mr. Ritterband:

Q. At the time you speak of his having mentioned to you in reference to the thieves—he thought they were thieves and fired at them, and found they were cats. I suppose you do not know of your own knowledge whether they were thieves or not?
37 A. No, sir.
Q. They may have been thieves, and he may have fired at them?
A. He told me that they were not thieves—that it was a cat.
Q. He told you he was mistaken?
A. He thought for a long time they were thieves, and when he fired he found it was only a cat.
Q. That he found out after he fired?
A. After he fired.
Q. This story that he told you about the Cooper Institute—that was a dream he was telling that he had?
A. No, sir; he said he woke up and a gentleman clapped him on the shoulder, with long white hair, and then he stated the case; he did not know where he was; he seen a grave right before him.
Q. Where did this statement to you take place?
A. In my store.
Q. When was it?

A. This must have been about seven years ago; shortly before he moved up town—when he lived in Pitt street.

Q. Was not it eight years ago?

A. No, sir; it could not be.

Q. How do you know?

A. Because it was shortly before he moved up town.

Q. You say you are certain it was not eight years ago?

A. I am sure it could not be eight years ago.

Q. Why?

A. Because he lived in Pitt street, and he has lived up town now going on six years, and he did not live very long in Pitt street.

Q. Do you know when he went to live in Pitt street?

A. Yes, sir.

Q. What year?

A. He gave up his business and went to live in Pitt street; he lived in Division street.

Q. When did he go to live in Pitt street?

38 A. I could not tell the date.

Q. Was not he living there in 1864?

A. That was the time he was sick.

Q. Was he not living in Pitt street in 1864?

A. He was.

Q. How long before that was it that he went to live in Pitt street; was it a year before 1864 or two years?

A. I could not say exactly; it could not have been more than a year before.

Q. It was about a year before?

A. Yes, sir.

Q. And this was about the time he told you this dream?

A. Yes, sir.

Q. Now this story with reference to the cat—this was a story he was telling to amuse your children?

A. No, sir; he was telling it to me, and he told the story repeatedly to the children.

Q. What did he say about the cat?

A. When he kept a shoe-store in Division street——

Q. What did he say?

A. Had a cat there, and the cat used to understand him when he would talk to it; climb up a pole, and when he got on top of the pole he tried to talk to him, the same as a child would.

Q. You have heard of persons teaching cats to climb poles?

A. No, sir; I have not.

Q. You thought is was something very startling?

A. I did.

Q. That was one reason why you supposed he was not in his right mind?

A. Yes, sir.

Q. This working with a pole at the water-closet—where was the water-closet?

A. In the house I live in

Q. Whereabouts in the house?

A. In the yard.

39 Q. Was it a water-closet used by all the persons in the house?

A. Yes, sir.

Q. Did it become stopped up sometimes?

A. We did not find it so. He said he was trying to let the sewer run off, and he worked until he worked himself sick.

Q. Was it dry or wet weather?

A. Dry weather.

Q. What time of the year?

A. It happened a great many times; when he took a notion.

Q. He examined the water-closet, found it stopped up, and worked with a pole?

A. No, sir.

Q. Was it ever stopped up?

A. He said it was, but we never found it so.

Q. You never examined it?

A. We were wondering what he was working at; it was not overflowed.

Q. Do you mean to say it could not be stopped up without being entirely flowed over?

A. I don't know.

Q. You have seen the water-closet frequently?

A. Yes, sir.

Q. Did it connect with the sewer?

A. Yes, sir; but shortly after it was cleaned out, he done that—he made a practice of it.

Q. So as to keep it clean and connect it with the sewer—that was your impression at the time?

A. I suppose so.

Q. On this occasion, when he had these new soles put on your child's shoes, which child was it?

A. My oldest child.

Q. The little girl?

A. Yes, sir.

Q. That was the little girl he was quite fond of at times?

A. Yes, sir.

40 Q. When was this?

A. About six weeks before his death.

Q. Did not you understand the counsel was confining your attention to what occurred six or seven years ago, when you answered it?

A. I answer the question I know*ed* before.

Q. How long before his death was it that you paid this particular attention to the water-closet you have spoken of?

A. This happened last summer.

Q. About how long before his death was it that he told your children about the cat?

A. This happened a long time ago, when he was living in Pitt street.

Q. Two years ago?

A. More than that—it must have been seven years ago, when he lived in Pitt street.

Q. What makes you think it occurred at that time?

A. He came into my place there.

Q. You have lived there thirteen years?

A. Yes, sir.

Q. What makes you think it occurred exactly seven years ago?

A. Because I know the time he moved up town.

Q. Did he move up town in 1864 or 1865?

A. He moved in July.

Q. Do you know it was in 1865 that he moved up town?

A. It must have been.

Q. This occurred with reference to putting the new soles on the child's feet—occurred six weeks before his death?

Q. Yes, sir.

Q. When did he die, do you know?

A. He died, I believe, the first of February; he met my little girl in the car.

Q. Do you know when he died?

A. Yes, sir.

Q. When?

41 A. The first of February—at night, the first of February.

Q. How long have you lived in New York City?

A. I have lived here, I believe, since 1849.

Q. Where did you live before you lived in New York City.

A. In Poland.

Q. You say he took the child to the Academy of Fine Arts?

A. Yes, sir.

Q. With your permission?

A. Yes, sir.

Q. How long ago was that?

A. That happened since he lived up town.

Q. Since 1865?

A. Yes, sir.

Q. This breaking of the sidewalk—how long before his death did that occur?

A. Three years ago, exactly, now.

Q. How long before his death was it that he came into your place and asked you to leave after you had paid the rent?

A. That was three years ago.

Q. How long before his death was it that he mentioned this fact in regard to the photograph gallery?

A. This was here a little before the holidays.

Q. It was about three or four months before his death?

A. Yes, sir; about that.

Q. When was it that it occurred to you that he was not right in his mind—how long before his death?

A. We thought so all the time he lived up town.

Q. Since 1865?

A. Yes, sir; he acted very queer; he used to bring us in boxes of pills.

Re-direct:

Q. Did you think he was in his right mind when he told you about the ghost story?

42 A. No, sir; I did not.

Q. When was that?

A. That was before he moved up town.

Q. What year was that, about?

A. That must have been about seven years ago.

Q. Did you think he was in his right mind when he told you about the cat story?

A. No, sir. I thought it was very queer, his telling me such a story about a cat.

Q. Then those were the only two circumstances you recollect now that took place six or seven years ago?

A. Yes, sir.

Q. These others took place since 1864?

A. Yes, sir; since he moved up town.
Q. Do you know when he moved up town?
A. He moved somewhere, I don't really remember what year. I know he has lived up there quite a while with me.
Q. Do you know how many years? Can you get at it in that way?
A. I remember my mother has been dead five years last September, and he moved somewheres along in July. I don't think it is quite five years since he moved up town.

ELIZA JANE ALPHONSE, called for contestants, sworn.

Direct examination by Mr. Flynn:

Q. Where do you reside?
A. No. 273 Delancey street, New York.
Q. Did you know Charles Fox in his life-time?
A. I did.
Q. Was he a relative of yours?
A. He was.
Q. How near relation was he to you?
A. He was a cousin.
Q. How long have you been acquainted with him?
A. Thirty-odd years.
43 Q. Did you live in the same house with him?
A. At times I did; different times, not always.
Q. Can you state any facts in relation to any peculiarities he had?
A. Well, yes, sir; I can.
Q. Will you state anything you know in relation to him?
A. Well, he boarded with us at one time.
Q. When was that?
A. That was twenty-five y'ars ago.
Q. You need not go back as far as twenty-five years ago. Confine yourself to matters that happened ten years ago, or up to 1864?
A. Well, at that time he used to visit us, ten years ago. He would come in and would sit down a few minutes. He would pull off his coat. He would say a few words, and he would get up again and put it on and go as far as the door, and he would come back again and pull it off and sit down again and say a few words, and then, if he would get on his coat the second time, he would say he was all in a perspiration, and he would have to pull it off again, and he would talk and go off, and perhaps it would be all done in ten minutes.
Q. Go on and relate circumstances in connection with him from that time down.
A. He has always acted that way all through. Before that he boarded with us.
Q. What about when he boarded with you?
A. He would come down to his meals, and things that were gotten, he would ask where they were bought, and sometimes he would say he would not eat it from such a place, and he would want it put one side and go out and buy others, and it was pretended to him that we did, and he would eat the same and say it was much nicer than what came from the other place, and perhaps it would be just the same.
Q. Do you recollect anything about a turkey sent there by his brother James as a present?
A. I do. They took him up a plate of turkey.
44 Q. When was that?
A. That was eight years ago, and he put it one side; he would

not eat it; and in about three days after it was brought up to him he came home one night, he said pretty hungry, and he ate a piece of the turkey, and he left the other remaining on the plate.

Q. Did he make any statement in relation to that turkey?

A. He said he did not want to eat it; he did not know what it might do to him. He kept one piece remaining on the plate, if he was taken sick.

Q. Did he say he was afraid it would poison him?

A. Yes, sir.

Q. Do you recollect anything else?

A. I don't know as I do.

Q. You told me forty things.

A. But it is so far back.

Q. Confine yourself to five or six years. What was his general appearance at these times? How did he look?

A. Well, he looked kind o' wild at the last. We did say amongst ourselves that we believed that he was——

(Objected to.)

Q. What conclusion did you form yourself from these facts and conversations?

(Taken subject to the same objection.)

A. That he was an insane man; that he did not have his right mind.

Cross-examination by Mr. Cooney:

Q. At what time of the year was it that you spoke of his coming in and taking off his coat?

A. I said that it was seven years ago.

Q. At what time in the year—what month?

45 A. I did not tell what month it was in.

Q. Did you see him often do it?

A. I said I seen him about once a year.

Q. How often did he come in your house?

A. He used to come in very often.

Q. How often did you see him take off his coat?

A. Several times.

Q. Do you know what time of year it was?

A. I could not tell.

Q. Do you know whether warm or cold weather?

A. It was in cold weather.

Q. You said he was in perspiration?

A. If he sat with the coat on.

Q. Was that an overcoat you speak of?

A. Yes, sir.

Q. Did he ever state before you any objection he had to buying from some stores and not from others—grocers?

A. Yes, sir.

Q. What reason did he give for liking one better than others?

A. Well, he did not like the people.

Q. Did not think they were so nice?

A. He was afraid they would poison him.

Q. Was he on friendly terms with his brother that sent him the turkey?

A. At that time they were on friendly terms.

Q. For how many years had they not spoken?

A. I don't know as there was any time then. I did not say anything about his not speaking to the brother.

Q. You say they were not on friendly terms?
A. I did not say so then, at that time.
Q. Is such the case? Were they or were they not?
A. They were on friendly terms at that time.
Q. Do you know of any time that they were not on friendly terms?
A. Yes, sir; there was a time that they were not friendly.
46 Q. Was not he afraid of all his relations?
A. Yes, sir; sometimes he was.
Q. Why did you think he was insane?
A. Well, he acted that way.
Q. How did he act? Give us some idea.
A. Well, by flying in and putting on his coat; taking it off and putting it on; that was one thing; and other times if I had a friend come in when he sat there—if he just came in, he would jump up and go out, if he had not been in the house a minute.
Q. For that reason you thought him insane?
A. I did.

Re-direct:

Q. You know other reasons, do you not?
A. Yes, sir; I know other reasons.
Q. Give them to us.
A. I have answered all that you have asked me.
Q. (By the surrogate.) You have given the facts and circumstances?
A. I have told you all at that time; perhaps I could sit and tell other things.
(Counsel for contestants reserves right to recall Mrs. Alphonse.)

MARY FOX, called for contestants, sworn.

Direct examination by Mr. Flynn:

Q. Where do you reside?
A. No. 36 Ryerson street, Brooklyn.
Q. Did you know Charles Fox in his life-time?
A. Yes, sir; I did.
Q. What relation were you, if any, to Charles Fox?
A. I married his brother James.
Q. You are the mother of these children that are contesting this will?
A. Yes, sir; I am.
47 Q. When were you married—how long ago?
A. It will be eleven years, the 24th of July next.
Q. Do you know any facts connected with Mr. Fox, about five and a half or six years ago, or previous?
A. Yes, sir, I do.
Q. What are they?
A. It was along in the holiday time, one of the neighbors baked a mince-pie.
Q. Holiday time, when?
A. About six years ago, I think; baked a mince-pie and gave it to him, and he took it up in his room, and kept it two or three days; he then brought it down into the basement where I was; he said, "Mary, I want you to throw this mince-pie away; I am afraid to eat it, I am afraid it is poisoned." I washed the plate and gave it to him.
Q. Anything else?
A. He was boarding at a place where I was, and one morning he brought in a loaf of bread, three eggs, and two onions; he wanted one egg cooked for his breakfast, and ordered some bread cut off for his

breakfast, and told the landlady to keep the other for him; this made the landlady angry and he left.

Q. Anything else?

A. He moved in the house in Pitt street, and moved in the room where his mother lived—in the rooms where his mother lived and died; he did not know what was the reason, but he could not sleep in the room that his mother died in, he said; he drew out his bed a number of times into the other room; then he would draw it back again; I would hear him several times through the night doing so—in the night-time; he told me then the next day he did not know what was the reason he could not sleep in that room.

Q. Do you know whether or not he objected to the food prepared by his mother for him?

A. Yes, sir.

Q. What reason did he give for that?

48 A. Because he thought it was poisoned.

Q. Do you know whether or not he objected to the turkey sent by your family to him?

A. I remember preparing the turkey on to a plate; yes, sir, I know the fact; I know when I done so.

Q. (By Mr. Cooney.) Do you know the fact of his objecting to it—whether he objected to it or not—except thrcugh hearsay?

A. No.

Q. Do you know whether he objected to his mother washing his clothing?

A. No; I don't remember.

Q. Do you know any other facts in relation to him, happening about that time?

A. I know he never went out of doors, left his house, without going about half a block and returning back again into his house; he always acted very singular in that respect.

Q. Will you state his general appearance, about his actions, his appearance; about the eyes, particularly.

A. His general appearance to me was a man that I would not think was in his right mind.

(Objected to.)

Q. I mean how he appeared to you, how he acted?

A. He appeared to me always like an absent man; a man that had an absent mind, as though he did not know his mind; that is the way he appeared to me, and I always felt that he did not.

Q. What peculiar expression, if any, was there about his eyes?

A. A wild look to me always; I never looked at him unless he looked wild.

Q. Do you know the fact whether he had an aversion to his relatives?

A. He did not like them.

Q. He did not like any of them?

49 A. No, sir; I don't think he liked them.

Q. And thus, from this conversation which you had with him, and the acts which you have seen him perform, did you believe him to be a rational man?

(Same objection.)

A. I believe that he did not have his right mind.

Cross-examination by Mr. Cooney:

Q. How long has your husband been dead?

A. He has been dead about nine months; he died the sixth of May last.

Q. Your husband's name was James?
A. Yes, sir.
Q. Was he on friendly terms with his brother Charles?
A. Yes, sir; he used to go up there; he went up there, I cannot say just when, but awhile before he died—I think the summer before he died—and took the children up there, and they were on friendly terms. I think he wanted to see him; he always felt that James wanted to see him.
Q. You stated he never left the house without turning back; did he seem to be afraid of anything or anybody?
A. I think he was.
Q. Do you remember the fact of his receiving a very severe beating on the street, of his being attacked and very badly beaten?
A. No, sir; I don't remember.
Q. Have you not heard that such was the case?
A. I might have heard it, and it slipped my memory.
Q. Have you never heard that parties made threats against him, residing in the neighborhood?
A. No; I don't remember.
Q. When was it, in what year, that this pie was sent to him?
50 As near as I can come at it, it was about eight years ago.
Q. Where was he living then?
A. He was living in Pitt street, I think; I think it was about that time.
Q. Do you know, of your own knowledge, that he ever objected to any food prepared by his mother?
A. Yes, sir.
Q. Were you present when he objected?
A. No; I heard it from my husband, his brother.

WILLIAM P. FERGUSON, called for contestants, sworn.

Direct examination by Mr. Flynn:

Q. Did you know Charles Fox in his life-time?
A. I did.
Q. How long did you know him?
A. Well, I have known him for a good many years.
Q. About how many years?
A. Well, say thirty years.
Q. Were you any relation to him?
A. Yes, sir.
Q. What relation?
A. Cousin.
Q. Can you give us any of his peculiarities?
A. Do you want me to go as far as when he commenced his shoe business?
Q. Yes.
A. Well, sir, I was the first boy he had when he sot at the shoe business; I was a little boy.
Q. How long ago was that?
A. Well, I was about fourteen years old, I think.
Q. How long ago was it?
A. I could not exactly say.
Q. Twenty or thirty years?
A. About thirty years, I think.
Q. You have known him all along since that?

51 A. Yes, sir; you see I have been out of the place considerable. I have been in his company different times; he has been to my house, called in; I boarded there a year in Brooklyn, with my mother, and he always used to come there every Sunday, to see my mother.

Q. Give the facts.

A. He would call in and sit down and would get up and take his coat off and put it on the back of a chair—get up and put it on again, and when he would go, you would think there was something said that he did not like; I always thought a good deal of Charles; he acted to me just as his brother did; I served my time with his brother.

Q. Do you know whether insanity was hereditary in the family?

(Objected to; objection sustained; exception taken.)

Q. Do you know what his father died of?

A. I was not acquainted with his father.

Q. What did his brother Joe die of?

(Objected to; objection sustained.)

Q. Do you know any other facts in connection with him?

A. Well, I know that my mother has cooked for him; he boarded with my mother, and she cooked to her best knowledge what she thought he would relish; she went out and got chicken, I recollect, one time, and cut the leg off and broiled it for him, and sat it down, and he came down to the table and took it and gave it a flirt one side.

Q. Why?

A. It appears it was not right for him.

Q. What do you mean by that?

A. Because he put it away, you know—put it one side.

Q. Did he state what his objections were to it?

52 A. He never spoke.

Q. (By Mr. Cooney.) You do not know whether it was well-done, or raw, or not?

A. Yes, sir; I do.

Q. How long ago were these facts you have detailed?

A. It was a good many years ago; over thirty years ago; about that time.

Q. Do you know of any facts in the last ten years in relation to him?

A. What I said about his coming to my mother's; I was here at that time.

Q. You have seen him a number of times since?

A. Of course.

Q. How did he look?

A. He looked to me wild.

Q. What was the appearance of his eyes?

A. It was a wild look.

Q. You have conversed a good deal with him, have not you?

A. Yes, sir.

Q. And seen him act a good deal?

A. Yes, sir.

Q. What conclusion did you draw from his acts and your conversations with him that you have stated, as to his being rational or irrational?

(Objected to; objection overruled; exception taken.)

A. Well, sir, I don't think he was in his right mind, not by the way he acted.

Cross examination by Mr. Cooney:

Q. How long was he in this boot and shoe business?

A. Well, I could not tell, for I left the city.

Q. How long were you with him?

53 A. Well, probably I was there a year; it is so long ago I can hardly recollect.

Q. Did he do a large business?

A. Well, middling; he had custom-work.

Q. Was he successful in that business?

A. Yes, sir.

Q. He had the reputation of being a good merchant?

A. Well, yes, sir; but it was not on a very large scale.

Q. As to this time, about cutting off the leg of chicken and broiling it, it occurred about thirty years ago?

A. I should think it was about in that neighborhood.

Adjourned until Tuesday, March 15th, at 11 o'clock a. m.

NEW YORK, *Saturday, March 19th*, 1870.

CHARLES RODH, called for contestants, sworn.

Direct examination by Mr. Vanderpoel:

Q. Where do you reside?

A. I reside at 163 East Thirty-third street, in this city.

Q. Are you a practicing physician and surgeon?

A. Yes, sir.

Q. How long have you been such?

A. Ten years.

Q. Since you were admitted to practice have you resided all the while in this city?

A. Yes, sir; since that time.

Q. Did you know Charles Fox in his life-time?

A. Yes, sir.

54 Q. Have you made diseases of the mind as well as of the body a study?

A. Yes, sir.

Q. When did you become acquainted with Charles Fox?

A. In 1864.

Q. Did you have occasion, at or about that time, to examine him professionally?

A. Yes, sir.

Q. Where did you go to see him?

A. He came often to my room.

Q. Was your office near his residence?

A. Yes, sir; I lived in one of his houses in Third avenue, near Thirty-seventh street.

Q. About how long did you live in one of his house?

A. About thirteen months; it was over a year. I don't remember exactly; it may be fifteen months. I don't recollect.

Q. But after you removed from his house, were you in the habit of seeing him?

A. Yes, sir.

Q. Where—at your own office?

A. No, sir; I met him sometimes in the street or in the cars.

Q. Did you visit him at all?

A. No, sir.

Q. About what time in 1864 did you become acquainted with him?

A. I can't tell it exactly.

Q. In reference to the month of May of that year?

A. I guess before that time; yes, sir.

Q. Did he make any complaints to you, at or about that time, as to his health?

A. Not at that time.

Q. When was your attention first called to his physical health?

A. During that time, when I lived there in his house; that was 1865; about a year after that.

Q. Where were you living at the time you became acquainted with him?

55 A. I lived in Third avenue, between Thirtieth and Thirty-first streets.

Q. Near his place?

A. Near his place. I was in his neighborhood almost every day.

Q. The question of Mr. Fox's mental condition is under investigation here, and I wish you would go on, in the first place, and state in your own way whether you noticed anything peculiar about him mentally; and, if so, what, from the time your acquaintance began with him?

A. He had always something particular in his appearance—something that was abnormal; in his speech, when he talked, he was very quick, and very much excited easily without any particular cause.

Q. He became very much excited easily without any apparent cause?

A. Yes, sir.

Q. Go on and state what else you saw of him.

A. I had not much conversation with him at that time; but in 1865 I made more observations of his mind, and found out that the cause of his actions were more based on a disease of the brain, or, if not on the brain, on lesion of the bone.

Q. Do you mean the cranium bone?

A. The cranium bone, or the membrane of the bone or of the brain; in 1865 I saw him very often. I observed him more. He talked sometimes about his circumstances with me. He complained sometimes about dizziness in the head. He complained sometimes that he got excited in a very easy way. He complained about costiveness, but he did not want me to prescribe for him; he always said he was his own physician; he showed fear for any physician.

Q. In what way did he show it; what did he say?

A. I don't recollect exactly, but the impression was that he thought a physician would poison him. I talked about it, his manner of living; he said he got his meat every day himself, and his potatoes, and then he was quite sure what he got for dinner.

56 Q. Did he speak of his relatives?

A. He talked about them; I asked him if he had any relative, and he was opposed to all his friends and to his relatives; I guess he did not have one friend as far as I recollect; he was in fear.

Q. As the result of your examination, did you form any opinion as to whether he was sane or insane?

A. I formed, sir, the opinion that the freedom of his will or mind was prevented by that disease of the brain.

Q. To what extent was it prevented—it is hardly answering my question; did you conclude whether he was sane or insane?

A. He had delusion in that way, that he had fear.

Q. Did he refer to having any enemies at any time?

A. No, I don't remember that.

Q. State to the court fully the conclusion which you formed at that time as to the mental condition of this man Charles Fox.

A. The condition of that man was not in a normal state; that is my impression.

Q. Did you regard him as insane?
A. Yes, sir.
Q. You say you examined him carefully in the year 1865—I don't understand whether you made any special examination of him in 1864?
A. No, sir.
Q. I want to know whether, when you examined him in 1865, you had your attention called to the fact that the traits he then exhibited had also exhibited themselves in 1864?
A. Yes, sir; his behavior was about the same as that time; if he came to a place he took off his coat and then put it on again; he took off his overshoes, in the same minute he put *it* on again, and all his behavior was the same in 1865 as it was in 1864.
Q. I infer from your statement that he was a restless, uneasy man?
57 A. Yes, sir; he complained about that, and he took always pills of his own making, he said; I don't know what *it* contained; he kept a secret about the pills. He had no confidence in me about the pills.
Q. Did you notice anything about his eyes, any peculiarity at any time?
Q. Yes, sir; the pupil of the eye was contracted, but it might be the result of headache, in congestion of the brain that he had at that time, but it proved to me that he had congestion of the brain.
Q. Did you ever hear him speak of his brother or of his brother's family?
A. Yes, sir; I remember he talked about it, but I don't recollect exactly what it was he talked about it; I know that he talked about a brother, but I don't recollect any particular now about it.

Cross-examination by Mr. Cooney:

Q. You were not born in this country, were you?
A. No, sir.
Q. Where were you born?
A. I was born in Germany.
Q. How long have you been in this country?
A. I am here ten years.
Q. Just ten years?
A. Just ten years.
Q. When were you admitted to practice as a physician?
A. I have been practicing this ten years.
Q. In what year were you admitted?
A. In 1860.
Q. From what institute did you graduate?
A. I graduated in Giessen, in Germany, in 1853, and here in 1866, in the college in Twenty-third street.
Q. Between 1860 and 1866, were you practicing without a diploma in this country?
A. Yes, sir; I had a diploma.
Q. Had you a diploma to practice here between 1860 and 1866?
A. Yes, sir.
58 Q. You say you graduated here in 1866?
A. But I graduated in Germany in 1853.
Q. Did you have a diploma to practice here, from 1860 to 1866?
A. No; I did not want a diploma.
Q. Have you ever been connected with a hospital or college in a professional way?

A. Yes, sir.
Q. As what and where?
A. In Bellevue Hospital and in the Broadway Hospital.
Q. What year in Bellevue?
A. In 1862 and 1863.
Q. 1862 and 1863 in Bellevue?
A. Yes, sir.
Q. What was your position?
A. I was not a physician there; I attended sometimes a lecture there.
Q. You were not connected professionally with the hospital?
A. No; I had no situation there.
Q. Were you ever connected professionally with any hospital or institution of medicine of any kind in this country?
A. No, sir.
Q. Or in Germany?
A. No, sir.
Q. When did you first become acquainted with Mr. Fox?
A. In 1864.
Q. Where was he living at that time?
A. I don't know; I did not see him in his house; I saw him in the neighborhood there always when I passed by, or in stores.
Q. Do you remember that you merely saw him on the street or in a store?
A. In different ways.
Q. How did you become acquainted with him and when?
A. I saw him the first time—there was a woman fell in the street there, and——
59 Q. When was that?
A. That was about 1864.
Q. Why do you fix upon 1864; did you make any memorandum of the year?
A. I know that it was about a year before I removed to him. I saw him since that time oftener.
Q. How do you know that that was a year before you removed to him?
A. As far as I could recollect; it may be a month over a year or a month less; I don't recollect.
Q. What month was that—what time in the year?
A. I cannot say exactly the month.
Q. Don't you know what time of year it was?
A. It was in 1864.
Q. What time during the year?
A. It was early in 1864.
Q. How early—what month, about?
A. I can't say that exactly.
Q. Do you know that it was in the spring, summer, or fall?
A. It was in the spring, I know that; I knew him over a year before I removed there; I don't know exactly.
Q. How do you know it was in the spring when you saw him at that time; tell us about what month, if you remember, it was in the year—can you fix the month?
A. It is very hard to fix the month; it is much easier to fix the year; I know it was over a year that I knew him before I moved there.
Q. Was it warm weather?
A. Well, sir, I cannot say that.
Q. Well, how do you arrive at that being spring?
A. I know that I knew him about a year, or a little more than a year.

Q. That is the reason you fix it as being in the spring that you first saw him?
A. Yes, sir.
Q. What occurred at that time when you saw him?
60 A. A woman was fallen in the street, and she was brought on the sidewalk. He assisted her, and another person was standing near, and said, "There is a physician;" and by that I had a conversation with him.
Q. Had you ever seen him previous to that?
A. Yes, sir; I saw him very often.
Q. But not to speak to him, though?
Q. No; that was the first time I talked with him.
Q. When were you first called on to attend him?
A. I did not attend him.
Q. Were you ever called to attend him?
A. No, sir; he came to my office, and he talked about his circumstances only.
Q. He never called on you professionally as a physician?
A. No, sir; I never got any fee from him, but he complained to me.
Q. Where was this office; in one of his houses?
A. Yes, sir.
Q. Was he in the habit of calling there to collect his rents?
A. Yes, sir.
Q. Looking after his business?
A. Yes, sir.
Q. It was at these times that you met him?
A. Oh, he came very often.
Q. When he came there to look after his property and rents?
A. Yes, sir.
Q. Did you hire your place from him?
A. Yes, sir.
Q. What kind of a business man was he?
A. Oh, he was a good business man.
Q. You always found him very sound about such things?
A. Oh, yes.
Q. He had a good idea of matters and things that were going on around him; did not he?
A. Yes, sir.
61 Q. He was a thinking, reasoning man; was he not?
A. Partly; yes, sir.
Q. What do you mean by "partly?" What was he not in?
A. Sometimes he was strange.
Q. What was he strange in?
A. In his behavior.
Q. You say you have made diseases of the brain a study. Where?
A. In Germany.
Q. In your regular course of practice?
A. In my regular course of practice.
Q. Have you ever had the care or treatment of insane persons?
A. From time to time; not regularly.
Q. Have you ever made that a special study?
A. No.
Q. You never have?
A. No, sir.
Q. Are you familiar with the symptoms of insanity practically?
A. Yes, sir.

Q. Thoroughly familiar?
A. I think so.
Q. So that you could not make any mistake?
A. I think so.
Q. Do you know whether or not this man was not dyspeptic?
A. Dyspepsia is sometimes a consequence of insanity.
Q. Was not this man a dyspeptic also?
A. I don't know it.
Q. If such had been the case, don't you think that many of the symptoms that this man had would have been caused by that dyspepsia?
A. He was costive. You may call it dyspepsia.
Q. Is not that one of the symptoms of dyspepsia?
A. Dyspepsia itself is only a symptom.
Q. You say he was nervous, excitable, and apprehensive?
62 A. Yes, sir.
Q. Are not those symptoms of dyspepsia?
A. It may.
Q. Answer me positive; it is so, is it not?
A. Yes, sir.
Q. Don't you think that unless a physician made a very careful examination, that he might make a mistake between the symptoms of dyspepsia and insanity?
A. It requires a long observation to find out the difference between it and dyspepsia.
Q. Many of the symptoms are precisely the same, are they not?
A. Yes, sir.
Q. Have you ever met many eccentric people?
A. Yes, sir.
Q. A great many?
A. Yes, sir.
Q. Do you consider that all eccentric people are insane?
A. No.
Q. Don't you think a man can be very queer without being at all insane—very odd?
A. Patients can be eccentric in one way.
Q. How many times before 1865 did you ever see this man to talk with him on anything else than business?
A. I cannot recollect it exactly; but I saw him several times; it may be seven times or eight times, or more; I don't know exactly.
Q. You say in 1865 that he complained of dizziness, excitement, and costiveness?
A. Sleeplessness, restlessness.
Q. Would not the fact of a man's being costive produce dizziness?
A. Yes, sir.
Q. Would not it also make him excitable; it would be very apt to make him nervous—derange his system?
A. Not in that way.
Q. It would not derange the system to be costive?
63 A. No, it would not excite him; it would not make him so nervous and so restless and so dizzy—sleepless.
Q. But it would not excite him?
A. It would not excite him.
Q. Did you ever see anybody but Mr. Fox take off his coat and put it on again, or his overshoes?
A. They may once in a while.

Q. You have seen other parties do it?
A. Yes, sir.
Q. Did you think they were insane when they did it?
A. No, sir; of course.
Q. Do you think that a party who makes his own pills, or takes a medicine of his own, shows any symptoms of insanity by so doing?
A. It depends on the reason why he made his pills.
Q. No matter what reasons—do you think it would?
A. No.
Q. Not at all?
A. No.
Q. Do you think it an evidence of insanity for a man to be afraid of having a physician, to be distrustful of them?
A. No.
Q. How did you ascertain about this disease of the brain; when did you make this examination; you say you were never called in by this man?
A. Yes, sir.
Q. He never employed you?
A. No; but he complained; he talked about his disease with me.
Q. How was this examination made?
A. He complained; I took up all his symptoms; I inquired about the course.
Q. What course; what do you mean?
A. How it was in connection with his bowels; his dyspeptic conditions, and so: he said he got a stroke or fall on his head some years ago, and since that time he had that excited condition—that fearful condition.
64 Is the contraction of the pupil of the eye a symptom of anything else than congestion of the brain?
A. Yes, sir.
Q. What other disease or cause would contract the pupil of the eye?
A. Any inflammatory condition of the brain or membrane, or any irritation to the brain.
Q. Would not anything else?
A. Irritation? No.
Q. Is there any other disease that would have that effect?
A. No; or if you would apply medicine to his eye direct, that would bring it on; perhaps opium.
Q. Is there any disease of the eye that would produce that?
A. Oh, yes; inflammatory disease.
Q. Any inflammatory disease would produce it?
A. Yes, sir; not every.
Q. How much practice have you had among insane people? How many patients have you ever had that were insane?
A. That is very hard to count that.
Q. How many have you had?
A. I cannot say that.
Q. About how many?
A. That is very hard; I did not have a great many.
A. About how many? Have you had a hundred? Have you ever treated a hundred insane people?
A. I don't think so.
Q. Have you ever treated ten?
A. I may have; more than this.
Q. I want to know, positively, how many have you treated.

A. It is very hard to say.
Q. Have you ever treated ten people who were insane?
A. Oh, more than this; twenty-five, I think.
Q. Where did you treat those parties?
A. I saw a great many when I studied in Germany. I saw a great many here.
65 Q. How many in Germany, when you were studying, did you treat there?
A. I did not treat there myself, but I saw them at clinique; the hospital.
Q. I ask you how many you yourself have treated. Have you yourself ever treated and had under your control and treatment five persons for insanity?
A. No; I guess not.
Q. Have you ever heard the remark made of eccentric people that they were insane?
(Objected to as irrelevant; question waived.)

Redirect:

Q. Is dyspepsia sometimes connected with, or does it proceed sometimes from, insanity, from an unsound condition of the brain?
A. Yes, sir; it is in coincidence. It is at the same time.

Recross:

Q. When you were at Bellevue Hospital, under what professors did you study there?
A. I attended the lectures of the professor, Dr. Clark.
Q. Who else?
A. Dr. Thomas.
Q. Were you in the class there regularly?
A. Yes, sir.

MARY MUNSEN, called for contestants, sworn.

Direct examination by Mr. Vanderpoel:

Q. Did you know Charles Fox in his life-time?
A. Yes, sir; I knew him when I was a little girl, but I had not seen him of late years until about 1866.
Q. Where did you see him then?
66 A. I lived in his house.
Q. Where was he then living?
A. In the same house.
Q. In Third avenue?
A. Yes, sir.
Q. What family did he have at that time?
A. None but himself; he lived all alone.
Q. Did he cook for himself?
A. Yes, sir.
Q. Who did his washing?
A. I guess he did it partially himself; he did wash some himself, I know; with the exception of his shirts—he gave them out.
Q. His underclothing?
A. He washed himself, I know.
Q. Did he give any reason for that that you heard?
A. No, sir.
Q. Who took care of his room?
A. Sometimes he would hire a woman, once a month or so.

Q. At other times?
A. He would take care of it himself; there was not much care taken of it.
Q. You knew him, you said, in early life?
A. I knew him when I was a little girl; he knew my parents.
Q. Of what country was he a native?
A. New York.
Q. Did you know his brother—his brother James?
A. I did not know so much of him; I was acquainted with his wife's family.
Q. You knew he had a brother James?
A. I knew he had a brother James.
Q. Did you ever hear him speak of his brother James after you became acquainted with him again, or renewed your acquaintance in 1866?
A. No, sir; not much; I have heard him speak——
Q. What have you heard him say?
A. He did not care much about him—he did not know much
67 about him, for he had not seen him; he did not go to see him very often; he cared very little for his family, he said.
Q. Did you ever hear him say anything as to what he was going to do with his property, in connection with his brother James?
(Objected to; objection overruled.)
A. I asked him the question once in regard to what he was so saving for—he had nobody to leave it to—his family—and they would not care much about it; he said they would not get anything he had.
Q. Did he give any reason?
A. No, sir; he was very parsimonious, and I asked him the question.

JOHN N. CLARK, called for contestants, sworn.

Direct examination by Mr. Vanderpoel:

Q. Did you know Charles Fox in his life-time?
A. I did, sir.
Q. Where did he live when you first knew him?
A. In Division street.
Q. About what year was that?
A. In 1854, as near as my memory serves me.
Q. Did you see much of him after that time?
A. Considerable, for a number of years—mostly daily.
Q. About how many years—down to the time of his death?
A. I kind o' lost sight of him for a while; I moved from the neighborhood; I formerly lived next door to him.
Q. In 1854 you lived next door to him?
A. From 1854 to 1860, six years, I lived next door, I think.
Q. State to the court what his conduct was during the time that you lived next door to him?
68 A. Well, I considered him a bad neighbor.
Q. In what way did it develop itself?
A. Well, in interfering in my arrangements next door; he would come in and say a good deal, and I told him that I did not wish him around the house—did not want him in the house.
Q. What was his disposition?
A. Well, to find fault.
Q. Would he find fault when there was a cause or without cause?
A. Without cause.
Q. What else did you notice about him?

A. I thought he was very eccentric—in fact, I thought he was crazy; that is the whole amount of it.

Q. Was that from any one isolated circumstance, or from his general conduct?

A. General conduct—general conduct, annoying, petulant, offensive.

Q. After 1860, did you see anything of him?

A. Yes, sir.

Q. Where?

A. I frequently met him in the street.

Q. Did you ever see him in any other places, or in any other way than just meeting him in the street?

A. I never was in his house; I moved away in 1860 from the place; he annoyed me, that I was glad to get out of the way with my family.

Q. In what way did he annoy you?

A. Coming there to find fault with things.

Q. (By the Surrogate.) Cannot you state any instances?

A. He said the water from my hydrant annoyed him; my hydrant was on the line, and he said that it annoyed him, and many things, so that I undertook to keep him off the property altogether; I built a high fence between us, and told him that I had nothing; it was a vacant lot, and I did not want to know him; did not want any trouble with him.

Q. In what way did he say the hydrant annoyed him?

69 A. The water running on his lot.

Q. Did it run on his lot?

A. Not that I know of; I had a drain to my place, and so drained it.

Q. What else did you see about him?

A. Well, I thought he was kind of an odd genius, and I paid very little attention to him; when he came there to annoy me, I told him I did not want anything to do with him; I wanted no annoyance, and I wished him to keep out of my house and not trouble me.

Cross-examination by Mr. Cooney:

Q. What is your business?

A. Builder.

Q. Were you a builder at that time?

A. Yes, sir.

Q. Your opinion was formed of this man from the annoyance he gave you?

A. Yes, sir; and his actions.

Q. From his being a bad neighbor?

A. Yes, sir.

Q. And finding fault and complaining?

A. Yes, sir.

Adjourned until Friday, March 25th, 1870, at 11 o'clock a. m.

NEW YORK, *March 25th*, 1870.

Adjourned until March 26th, 1870, at 12 o'clock m.

70 NEW YORK, *March 26*, 1870.

BENJAMIN M. YOUNG, called for contestants, sworn.

Direct examination by Mr. Flynn:

Q. Where do you reside?

A. No. 590 Water street, now.

Q. What is your business?

A. I am working at ship-caulking now.
Q. Did you know Charles Fox in his life-time?
A. Yes, sir.
Q. How long have you known him?
A. I have knowed him since the summer of 1835.
Q. Did you have any business relations with him at any time?
A. I had no business with him; I served my time in a shop with his brother.
Q. Did you come in contact with Charles many times?
A. Yes, sir; often.
Q. Do you know any facts or circumstances about him which you regard as peculiar?
(Objected to as leading. Objection sustained.)
Q. Did you know anything peculiar in relation to his actions?
(Same objection; objection sustained.)
Q. Do you know anything about him which you characterize as rational or irrational?
(Objected to; objection sustained.)
Q. Go on and tell us all you know about him.
71 A. All I know is, I served my time in a shop where his brother was; and I know once, I believe it was in 1846 or 1847, his brother had to leave his business to go up there and take care of Mr. Fox; that is all I know; he had to leave his business and go up there to take care of his business. He was not fit to take care of his own business.
Q. Did you see Mr. Charles Fox?
A. Yes, sir; I have seen him go out and leave his shop alone. Charles Fox, when he kept in Division street, he would go out and leave it alone, and his brother James had to go there and take care of the shop, and stay with him.
Q. Why did he have to take care of the shop for him?
A. Because he went and left it; because Charles would go and leave it, and he had to go and stay with him.
Q. What else do you know about him?
A. I don't know anything more about him. I have known him ever since. I saw him about, I think it was summer before last, when I was up at the Central Park one day, and had a talk with him—just spoke to him.
Q. Did you see him leave the shop that time?
A. Yes, sir; he came down to the shop where his brother was, and wanted his brother to go with him down town with some business.
Q. How did Charles act?
A. Wild.
Q. What did you conclude from his acts about whether he was in his right mind?
(Objected to; objection overruled; exception taken.)
A. From the way he acted I thought he was out of his mind—I did not know what.

HENRY LAMP, called for contestants, sworn.

Direct examination by Mr. Flynn
Q. Where do you reside?
72 A. Williamsburg, sir.
Q. Did you know Charles Fox in his life-time?
A. Yes, sir; I have slept with him.

Q. When did your acquaintance with him begin?
A. In 1836.
Q. Did it continue up to the time of his death?
A. No, sir; until some four years ago.
Q. You say you have slept with him?
A. I have; yes, sir.
Q. When was that?
A. From May, 1836, to November, 1836.
Q. If you know any facts in relation to him, I wish you would state them.
A. Well, sir, they would not let me answer the question; they would not take my opinion.
Q. I ask for the facts.
A. I have been acquainted with him. I have seen him in all his relations pretty much, and have noticed him, and at times there was something very peculiar about him. He would act at times—I will state an instance where he acted as though there was something wrong in his mind.
Q. Give us the instance.
A. The instance occurred when his brother Joseph was an imbecile and sick in the house, and I was visiting the house, and his brother rose up to strike me, and Joseph came around, or James, the brother, came around, and the three had a kind of idiotic laugh over the circumstance. This sick brother got up to strike me. Joseph was then an imbecile in Mr. Charles Fox's place, in Division street.
Q. Do you know any other circumstance?
A. I have met him since that on the ferry-boat when he has not recognized me.
Q. Do you remember any peculiar remarks that he made to you?
(Objected to. Objection overruled.)
73 Q. What remarks?
A. At times he would act as I told you—he would act peculiar, as though there was a vacancy. At other times he would act different.
Q. (By the Surrogate.) In what way would he act?
A. He would converse on one subject, then change his mind, and get up and have a peculiar laugh about the circumstance when he thought, perhaps, he would have the best argument with you.
Q. What else?
A. That is all.
Q. You don't recollect the specific circumstances—acts? All you know is, that the impression was conveyed to your mind that he acted peculiarly?
A. That would be it naturally. Yes, sir.
Q. Did you form any opinion from his action, in relation to the state of the man's mind, from what you have stated?
(Objected to. Objection overruled. Exception taken.)
A. From my intimacy with him, I think at times he was of unsound mind.
Q. That opinion is not based upon any one isolated fact?
A. No, sir; when I come to consider that certain things, being with him in the house, boarding with him, sleeping with him, and hearing his general conversation.
Q. You consider he was a man of what?
A. At times he was not of sound mind.

Cross-examination by Mr. Cooney:

Q. What is your business?

A. I am a caulker by trade.

Q. How long have you been such?

74 A. Since about 1836.

Q. Have you ever studied medicine?

A. No, sir.

Q. Have you ever made insanity a study?

A. Never.

Q. Have you ever treated any person for insanity?

A. Never.

Q. Are you familiar with the symptoms?

A. Never.

Q. Why did you think this man was of unsound mind?

A. From his general actions.

Q. What were those actions?

A. The actions were imbecile at the time.

Q. What did you base the conviction on?

A. The man was acting foolishly at times, when he got the best of an argument.

Q. Do you think, when he argued with you and got the best of you, and then laughed, that that was an indication of insanity?

A. Not with me; I did not argue with him. I have heard others argue with him.

Q. Have you been subpœnaed here?

A. Yes, sir.

THOMAS F. RANDALL, called for contestants, sworn.

Direct examination by Mr. Flynn:

Q. Where do you reside?

A. No. 510 Grand street.

Q. Did you know Charles Fox in his life-time?

A. Yes, sir.

Q. When did your acquaintance with him first begin?

A. In 1832 or 1833, I first became acquainted with him.

Q. Have you been acquainted with him from that time to the time of his death?

75 A. I was personally acquainted with him from 1832 or 1833, until about 1842; I went away and did not come across him then much until 1850 or 1851, and during the intervals I have met in associations with him, until the last two years I have not seen anything of him.

Q. Could you tell us any facts in relation to him?

A. Well, I can state several facts, I suppose.

Q. I wish you would.

A. I know that repeatedly he has went out and left his shop, of an evening, alone, without a light in it, the door half way open; he kept a shoe-shop there; him and me some years ago met in an association together, and I know, while in that association, that his language there——

Q. (By Mr. Cooney.) What time was that?

A. That must have been somewhere in the neighborhood of 1841 or 1842; no, it was later than that; it must have been in 1850, along in 1850, and I know while there, having conversation with him, time and again he would fly from one thing to another, fly from one thing to another continually; and I know while I was an apprentice in his brother's shop—his deceased brother James—he has very often left the shop and

come down there flying and took his brother away from his business; and at the time he was building them houses, I think in First avenue—I won't be sure—I know he acted very strange at that time, running around.

Q. Can you describe some of his actions at that time?

A. Yes, sir; if you were talking to him about one thing, he would fly from that right to another, and naturally he would give a kind of sneer and a ha, ha, and a laugh.

Q. Anything else?

A. No; I don't know as I could state personally on Charles anything.

Q. Do you know of any other facts?

A. No.

76 Q. Do you recollect at any time his leaving the store all alone?

A. I have stated that that was done time *and* memorial, I was going to say.

Q. From the facts you have stated, what did you conclude in relation to him?

(Objected to; objection overruled; exception taken.)

A. I should come to the conclusion, if I had the privilege to base my own opinion, that the man did not have his right mind.

Q. Did you form that conclusion from those facts?

A. Yes, sir; and I formed that conclusion when I was an apprentice; come to the facts of the case, he was that way more or less, then.

Q. Did you ever notice any difference in the man between that time and the time of his death?

A. Yes, sir; frequently, I have.

Q. Did you ever notice any difference between his actions then and his actions lately?

A. I have not seen him within two years, therefore I cannot state lately.

Q. Did he always appear to be the same?

A. No, sir; not always the same mind; sometimes he appeared to be acting more like a wild man than he was like a rational being.

Q. You say you met him in political associations?

A. Yes, sir; in different associations.

Q. What were his actions there?

A. His actions, as I said before, was, sometimes he talked very close to the point, and then the next moment be right square off on another thing altogether.

Q. Have you ever heard him say anything about any letters he had written to the Government in relation to the management of affairs?

(Objected to.)

77 A. No, sir.

SAMUEL W. DISBROW, called for contestants, sworn.

Direct examination by Mr. Flynn:

Q. Where do you reside?

A. No. 73 South Fifth, Brooklyn, eastern district.

Q. How old are you?

A. If I live to see the 12th of October coming, I shall be ninety-two

Q. Did you know Charles Fox in his life-time?

A. Yes, sir.

Q. What, if any, relation was he to you?

A. He married my daughter; he was my son-in-law.

Q. How long have you known him.

A. Between forty and fifty years; I guess something over forty.
Q. How old a man was he?
A. He was sixty-nine when he died.
Q. Have you had a number of conversations with him?
A. Oh, yes; he used to call over to my office every little while.
Q. Have you had conversations with him or he with you in relation to his writing to the Government?
A. Well, about ten months ago, I think it is, he was in the office; I thought it was later than that; but, come to reflect, because I have been where I am now, I moved last May, and just before I moved he was there; he seemed to be concerned about the debt of the Government—he was going, he said, to write to the Secretary of State, or some of the head men there, and give them his opinion on the financial affairs of the country, and he thought he could give them some advice that would be of benefit to them; I did not pay much attention to him; he was a man that talked a good deal, and very stiff in his way; I made no ar-
78 gument with him; I just heard what he had to say; very frequently when he was talking he would fly from one subject to another—leave this subject and go to something else, and it was in such a confused manner I did not pay much attention; I thought it was a pretty foolish idea.
Q. Can you give me any facts in relation to him, happening about 1864, or previous to that time?
(Objected to as leading; objection overruled.)
A. Well, I don't know anything very particular about 1864, but he was frequently at my office; every time he came there he was full of speculations, and he would be all over Williamsburgh looking for lots. I kept a land-agency office, and he was calling over there to inquire of me what I thought of this thing or that thing—about different parts of Brooklyn and East New York—where he thought he could lay out his money to the best advantage, where property was improving most, something like that. He wanted my advice, because I was in the business.
Q. Do you know any other facts in relation to him about that time; anything strange in his actions?
A. Not anything more particular than formerly. I always thought his mind was a little disordered. I always calculated perhaps he might be as his father was.
Q. How was that?
A. He was a deranged man—died deranged. I lived within three doors of him. He was all over. He did not do any business. He was a man out of his mind.
Q. Do you know of his having been engaged in writing letters to the Government at this time?
A. No, sir; I don't know as he ever wrote to the Government, but he thought he could give them some instructions that would be of benefit to them about the financial affairs of the country.

Cross-examination by Mr. Cooney:

79 Q. What is your business?
A. I am in a land-agency business. I have not done much this last year.
Q. How long were you in that business?
A. About 15 years.
Q. When did Mr. Fox marry your daughter?
A. Well, I could have told if I had looked. I merely called in casually.

I could have told you exactly. I have her marriage-certificate home in my desk. She gave it to me to take care of.

Q. About how long ago?

A. I think it must be as much as forty years.

Q. Did he marry her with your consent?

A. Yes, I suppose it was by my consent. I did not like it, but I did not object.

Q. Mr. Fox was speculating in real estate all the time, was he not?

A. Oh, no, sir.

Q. When he had money?

A. No, sir; it was only late years he went into land speculation. He had a kind of land-agency himself. He collected money and kept a shoe-store.

Q. Did he not frequently come to you for advice about purchasing property, as to its value?

A. No, he did not exactly come to take my advice. He merely wanted to know, in my opinion, where it was best to lay out his money, but he was always a little stiff-headed. He would take your opinion, and then do as he pleased afterward.

Q. He was a very positive man?

A. Yes, sir; very positive in his opinions.

Q. Do you know anything about his operations in real estate?

A. Nothing, only he bought some lots in different parts of Brooklyn, he told me. He would come and tell me he had purchased. I told him I thought he did very well. I did not know anything about it, but I did not want to discourage him after he had bought them.

80 Q. Did you think he did not do well at that time in buying that property?

A. No; I never said anything against his own purchases; he did as he pleased.

Q. Did you think that his purchases were bad?

A. No. I don't know. I don't think they were bad. I could not tell you now how they might turn out. The probability is, they would be good; and if it fell, it would be bad, the same as other things—the rise and fall of property.

Q. Do you know whether or not he was not an agent for other parties in selling houses and purchasing land?

A. I don't know anything, only what he said. He mentioned that he did something of that kind. I have no personal knowledge, only what he said. He came in and had a good deal to say, and talked, and I sometimes did not pay a great deal of attention.

BENJAMIN N. DISBROW, called for contestants, sworn.

Direct examination by Mr. Flynn:

Q. You are the guardian of these contestants, are you not?

A. Yes, sir.

Q. When did your acquaintance with Mr. Fox first begin?

A. Well, something over forty years; I can't tell exactly.

Q. I wish you would go on in your own way, and state any facts you know in relation to the man from that time up to 1864, and since.

A. Some few years previous to 1860, I did not see Charles much; after 1860, I see him up to 1865. Occasionally I asked him to call on me, and he called a number of times. Several times he made stated arrangements to take tea, and came there for the express purpose. He would take off his coat and sit down, and conclude he could not

81 stay, and put on his coat again. I told him to take off his coat and sit down. He would take it off and jump up and say, "I can't stay;" and that was in most every instance—on almost every invitation. Although he came for the special purpose, you could not keep him; that is, to take tea or dinner. On one occasion I gave him an invitation to come to a party. We had a large party. He came all fixed up. He came to the door and inquired for me. I was in the basement. He came down in the basement, all dressed up. I said, "Charles, why did you not walk up in the parlor?" Said he, "I can't stay." I said, "Stay; you came by invitation." "Well, yes, yes, yes, well," said he, "I guess I won't stay." I said, "I guess you have got to stay;" but he was so determined, I had to let him go. I said "Since you have taken the pains to come, help yourself to refreshments." "No, no, no." He would not touch anything; and in regard to the Government, he seemed to think that his advice would be beneficial. He told me he was writing occasionally to this Senator and that Senator, and this Congressman and that Congressman, and he was going to write to the President. From his whole action, I always thought he was not of sound mind. I always thought he was an insane man, and have always said so.

Q. He would accept invitations from you?

A. Yes, sir; and you could not keep him. He would take off his coat half a dozen times and put it on in the course of an evening. I would say, "You have got to stay." He would say, "Do you think I had better?" "Well, yes." Then he would take off his coat and sit down again.

Q. Do you recollect any occasion when he came to your house to tea and sat down to the table?

A. Yes, sir.

Q. State what that was.

A. After a good deal of persuasion, he would put on his coat. He did that a good many times. That was in the summer-time. I don't think he put on his coat, for he had not any overcoat then. The bell
82 was rung, and I went up and saw him, and said, "Charles, come down to tea." He said, "I can't stay." I said, "You won't go." I got him down to tea, and sat down to the table. He kept crowding towards me, and got right alongside of me. He got to sitting off from the table—something like twelve inches from the table. I believe he took one sup of tea, and that was about all.

Q. Did he eat anything?

A. I think not. We never could get him to eat anything; only in one instance, that was just previously to his death, that I ever knew him to eat.

Q. From the facts you have related, what did you conclude in relation to his being of sound mind?

(Same objection, ruling, and exception.)

A. He was an insane man. I considered him so, and did so consider him ever since I have known him. His mind was disordered.

Cross-examination by Mr. Cooney:

Q. How many times between 1860 and 1865 did you see Charles Fox?

A. I did not keep in mind the number of times. I know I seen him from 1860 to 1865 a number of times.

Q. About how many?

A. Oh, I could not tell you. It might have been fifty, and might not have been over thirty—I could not say. I keep within bounds. It might have been even more than fifty.

Q. You stated in your direct examination that he never staid of an evening when he came?

A. Never could keep him any length of time.

Q. What do you mean by saying he took off his coat six or eight times in the course of an evening?

A. It was of short duration—the continuous acts.

Q. He did it without stopping?

83 A. No, sir. May be two minutes—three minutes.

Q. Six or eight times in two minutes?

A. I did not say six or eight times in two minutes. I say a number of times. I meant a number of times.

Q. When you invited him to the party, did you believe him to be crazy?

A. I most assuredly considered him so.

Q. Are you in the habit of inviting crazy people to your parties?

A. He was a brother-in-law. He conducted himself properly. Of course I considered him a member of the family, and it is my duty to ask him, in courtesy.

Q. Was his wife living at the time?

A. No, sir. She has been dead some thirty-eight years—I don't know but a little over that; at least that.

(Adjourned until Saturday, April 2d, 1870, at twelve o'clock.)

NEW YORK, *April 16th*, 1870.

ALFRED P. CLARK, called for contestants, sworn.

Direct examination by Mr. Vanderpoel:

Q. Where do you reside?

A. No. 176 Nassau street, Brooklyn.

Q. What is your occupation?

A. Boat-builder.

Q. Did you know Charles Fox in his life-time?

A. Yes, sir.

Q. For about how many years did you know him?

A. I suppose from 1835 to 1840—from boyhood.

Q. Did you know any of his relatives?

A. Yes, sir.

Q. How intimate was your acquaintance with him?

A. My intimate acquaintance did not amount to much, because I used to shun him as much as possible.

84 Q. Was there any time of his life when you were intimate with him?

A. No, sir; I cannot say there was; not very intimate; I have been in his company frequently.

Q. How frequently did you have opportunities to see him?

A. Well, I used to see him, about 1837, every other day or two.

Q. Did you see him in recent years, previous to his death?

A. Yes, sir; I saw him last May, I think it was, and spoke with him.

Q. Did he make any complaint to you at any time as to his head—his condition?

A. He did the last time I saw him.

Q. What did he say on that subject?

A. Well, he complained of dizziness, and oppression of the chest.

Q. Was this in connection with any business matter that he made this complaint?

A. Yes, sir.

Q. This business matter to which you refer, in which he complained of dizziness—what was the nature of the business; was it complicated?

A. I went there to see him at the request of Mrs. Fox, to get a certificate of the burying-ground to bury his brother, which he refused to give up, which he had, previously to my going, refused to give up.

Q. You went to talk with him on that subject?

A. Yes.

Q. And it was in that connection that he spoke of this dizziness?

A. Yes, sir.

Q. Had you noticed anything in former years, or during your acquaintance with him, as to his manner of talking?

A. Yes, sir, very frequently; that made me shun him.

85 Q. What was there about his manner of talking, which called your attention to it?

A. Well, sir, you never could get a decisive answer from him, very seldom; if you asked him a question probably he would give you an answer on something else.

Q. Was there any incoherency in his talk, running from subject to subject?

A. I don't understand that question—incoherency; what is the meaning of it?

Q. Disjointed in his conversation—disconnected?

A. Well, yes, sir; I have had him to call me in the street—stop me on my way to business; and I would turn around and go to him, and and ask him what was the question; he would wheel right square round, and leave me without telling me what he called me for; that one circumstance I remember; that must have been some time in 1837.

Q. Sometimes, in talking with him on one subject, would he continue it, or ramble off on another?

A. Generally ramble off on something else; and that was the reason that I always shunned his company.

Q. Did you notice anything about his eyes?

A. Well, I never took particular notice of his eyes.

Q. Do you say you never noticed anything about his eyes?

A. No, sir.

Q. Any peculiar look about them?

A. He always had a peculiar look in regard to the expression of his eyes; I don't know that I ever took particular notice, or thought of it.

Q. What was the peculiar look?

A. He always had a kind of distant, grum look.

Q. From what you saw of him, did you form any opinion as to the condition of his mind?

A. Yes, sir, I have.

Q. What opinion did you form?

A. Well, sir, I always considered that he was troubled with lunacy.

86 Q. Did you visit him at his house or room at any time?

A. No, sir; this last time I visited him at his room.

Q. When was that?

A. It was last May, but the date I don't exactly recollect—when his brother died.

Q. His brother had died?

A. Yes, sir.

Q. Were you at his brother's funeral?

A. Yes, sir.

Q. Was this man, Charles Fox, there?

A. Yes, sir.
Q. After that did you have occasion to go to see him?
A. Yes, sir.
Q. Was it before or after the burial of his brother?
A. Before the burial.
Q. Where was he then living?
A. In Third avenue, but the number I don't recollect—'way up the Third avenue.
Q. Was any one else living with him?
A. No, sir; not that I know of; he was alone when I went.
Q. What did you find the condition of his room?
A. Well, sir, he lived in a little room with no furniture, further than one old chair, and a table and a stove; and the chair had no bottom in it, and he asked me to take a seat, and I told him I could not sit well on such a chair; I said it had no bottom, and he went and got an old coat and laid across it and I sat on it.
Q. What was the condition of the other furniture?
A. That is all the furniture I see.
Q. What was the condition of the room as to cleanliness?
A. I did not notice the floor; there was no carpet on it. I did not exactly notice whether it was very clean or very dirty.
Q. State in detail the occasion of your visit there, and what result attended it.
87 A. I went there through the request of Mrs. Fox, his sister-in-law. I took a seat in this chair and then I told him my business. I told him that I called there at the request of Mrs. Fox, to get the deed of the plot in Greenwood Cemetery, to bury James, his brother, and he said he did not know hardly whether he would be able to find the deed or not, he was so bewildered; his papers were very numerous and he did not know as he could find it. I told him they would have to have the deed in order to bury the body; said I, "What can be done about it? You must certainly try and find it;" well, he did not know; I said, "One thing is certain, if they don't find the deed I will have to go to the heads of the cemetery and try to bury him without it;" I said, "His wife is in great tribulation about it;" "Well," he said, "I will try if I can find it; tell Mrs. Fox I will be over in the morning, if I can," and that is all the satisfaction I could get.
Q. Did you see him after that?
A. I see him at the funeral.
Q. Did you see anything of his brother James before his death?
A. Yes, sir.
Q. How as to his brother Joseph?
A. Well, I was well acquainted with him; he has been dead some years; he died insane.
Q. Joseph died insane?
A. Yes, sir.
Q. How was it with James?
A. The same.
Q. Did you know anything about his father?
A. No, sir.

Cross-examination by Mr. Pierrepont:

Q. You say you have known Mr. Fox from childhood?
A. Yes, sir.
Q. Won't you tell us how old he was when he died?
88 A. Well, sir; I think he was some sixty-eight or sixty-nine; so I understand.

Q. When did he die?
A. I don't know the date when he died.
Q. You say he was sixty-eight or sixty-nine when he died?
A. I judge so.
Q. And died when?
A. I cannot tell when he died. I don't know; he died some two or three months ago—two months ago, I believe.
Q. His brother died last May, did not he?
A. Yes, sir.
Q. What was his brother's name?
A. James.
Q. His brother died insane, did he?
A. Yes, sir.
Q. Where?
A. At his own house in Ryerson street.
Q. Was he ever in a lunatic asylum?
A. No, sir, not James.
Q. Was Joseph ever in a lunatic asylum?
A. Not to my knowledge.
Q. They were both troubled with lunacy, were they, according to your judgment?
A. Yes, sir.
Q. When did you first become acquainted with Mr. Charles Fox, the deceased?
A. That I cannot recollect. I have known him all my life, you may say; was brought up in the neighborhood with him.
Q. Where?
A. In the Seventh ward.
Q. Born there?
A. No, sir.
Q. Did you go to school together?
A. I think we did.
Q. Did he show any signs of being troubled with lunacy in his boyhood?
89 A. Well, yes, sir; he was always very evasive in his answers; never could get a correct answer from him, hardly.
Q. Was he an intelligent boy?
A. I did not take him to be; he was too sedate—too distant.
Q. Was he attentive to his duties?
A. Well, I suppose he was.
Q. What did he do after his boyhood when you knew him?
A. Well, he was apprenticed to the shoemaker business.
Q. Was he attached to that business?
A. I suppose so. I did not see anything of him during his apprenticeship.
Q. When did you next see him?
A. I could not tell when I next see him. I see him occasionally there now and then.
Q. What business did he go into after he served his time?
A. I think he went into his own business—shoe business.
Q. Did he go in as a trader in shoes?
A. No, he worked at journeywork at first, and then he went in as a trader afterwards.
Q. Did you see him when he was a journeyman shoemaker?
A. I don't know whether or not. I think not.
Q. Did you see him when he first began as a trader in shoes?

A. I see him frequently then.
Q. Where did he begin?
A. In Division street.
Q. Were you often in his store?
A. No, sir.
Q. Do you know whether he got along well as a trader in shoes?
A. All I know is what I heard. I heard he did.
Q. Did you ever hear he was inattentive to his business or negligent?
90 A. No, sir.
Q. Did he show intelligence and carefulness in his business?
A. I never was in his shoe-store in my life.
Q. Then you don't know about that except by reputation?
A. Nothing but reputation.
Q. That was good, was it?
A. No, sir; his reputation never was very good in regard to his general conversation.
Q. What do you mean by reputation being not good?
A. Distant—unpleasant.
Q. That was the fault in his reputation?
A. You asked me how he was liked—how his character was.
Q. No, I did not ask that; I asked you what his reputation was in his business?
A. Well, that is what I answered; it was not very pleasing to converse with him; as for his business matters I don't know anything about it.
Q. As to his business management, was it good or bad?
A. That I don't know anything about.
Q. You know nothing of that reputation?
A. No, sir.
Q. Do you know anything of his success?
A. Nothing further than what I hear.
Q. What do you hear?
A. I heard he made a great deal of money.
Q. But he was distant and reserved?
A. Yes, sir.
Q. Was that a reason why you refused to have much to do with him, as you say?
A. Yes, sir; because he was unpleasant to converse with.
Q. The reason you did not have much to do with him is that he was unpleasant to converse with?
A. Yes, sir; you could not get him to converse on one subject a minute before he would fly off on to something else.
91 Q. You shunned his company?
A. Yes, sir.
Q. Was that the reason you shunned his company?
A. Yes, sir.
Q. Then you were not with him a great deal, were you?
A. No, sir.
Q. How long did he continue as a trader in shoes?
A. That I cannot tell you; a great while, I believe.
Q. Did you know when he was married?
A. No, sir.
Q. Were you at his wedding?
A. No, sir.
Q. Did you visit him during his wife's life-time?
A. No, sir.

Q. Did you go to his house once during his wife's life-time?
A. No, sir.
Q. Did you go to his store once during his wife's life-time?
A. No, sir.
Q. Did you borrow or buy, or trade or sell with him, or to him?
A. No, sir.
Q. Where was his house?
A. His house, the last I knew when I visited him, was up the Third avenue, but the number I cannot tell.
Q. After he went into business, where was his house?
A. I think it was in Rivington street—some of those streets.
Q. You never went there?
A. No, sir.
Q. How long did he live with his wife?
A. That I cannot tell you. I never saw his wife in my life.
Q. Do you know how many years was he a married man?
A. No, sir.
92 Q. Do you know how many years since his wife died?
A. No, sir.
Q. Did you know when his wife died?
A. No, sir.
Q. After his wife died, were you at his house?
A. No, sir; after his wife died, I was at his house this last May.
Q. Before that?
A. No, sir.
Q. Had he any children?
A. I think he had.
Q. Are they living?
A. I believe not; they are all dead.
Q. When did his children all die?
A. That I don't know.
Q. Won't you tell us before May, 1869, the last time you were ever in his house?
A. I never was in his house in my life until last May.
Q. You never were in his house until May, 1869?
A. No, sir.
Q. That is the last time you were ever in his house?
A. Yes, sir.
Q. And you went there in consequence of his brother's death, did you?
A. Yes, sir.
Q. And had it not been for being requested to go, you would not have gone there?
A. No, sir.
Q. For you did not like to talk with him?
A. No, sir.
Q. When did you first discover that he was troubled with lunacy?
A. Well, sir, I have always thought so, by his general conversation.
Q. You thought so when a boy?
A. I don't know that I did when I was a boy—since I have matured.
93 Q. You thought so when at school?
A. No, I don't say I thought so when at school, because I never formed any opinion of him then.
Q. When did you first think so?

A. Since I have been a man twenty-one years old, I formed that opinion.

Q. How old are you now?

A. Fifty-eight.

Q. From the time you were twenty-one you formed the opinion that he was troubled with lunacy?

A. Yes, sir.

Q. And you continue it now?

A. Yes, sir.

Q. You say, in speaking about his eyes, that you did not see anything peculiar in his eye?

A. No, sir.

Q. You never had your attention called to that?

A. No, sir.

Q. But you say he was not a pleasant man?

A. Yes, sir.

Q. Distant and disagreeable?

A. Yes, sir.

Q. When you went last May did you know what finally became of that deed of the burial-place?

A. No, sir.

Q. You never heard anything more about it?

A. No, sir.

Q. Was the brother buried?

A. Yes, sir.

Q. You saw him at the funeral the next day?

A. Yes, sir.

Q. The brother was buried in the burial-place?

A. I presume so; I did not go to the grave.

Q. Do you know whether the paper was found?

A. I know nothing more about it.

Q. You say that he told you he had a dizziness of the head and that he had a great many papers, and he would try to find it?

A. Yes, sir.

Q. That he told you?

94 A. Yes, sir.

Q. He complained then of not being very well?

A. Yes, sir.

Q. And you thought he was not very well?

A. Yes, sir.

Q. Was he ever in an asylum?

A. Not to my knowledge.

Q. Was he ever doctored for insanity that you ever knew?

A. No, sir; not that I knew.

Q. Did you know whether he was successful in making money finally?

A. I judge so. I did not know anything about it.

Q. When you went to this house that you speak of last May—May, 1869—you found no carpet on the floor?

A. No, sir.

Q. And you found a chair without a bottom in it?

A. Yes, sir.

Q. If you had found a carpet on the floor, and if you had found it luxuriously and well furnished, would that affect your judgment any about his being troubled with lunacy?

A. Not at all.

Q. Then that fact did not operate at all on your mind?
A. Not at all.
Q. Not the least?
A. No, sir.
Q. Then the fact of the poorness of the furniture and the bareness of the floor had nothing to do with judgment of his lunacy?
A. Not in the least.
Q. At the time you went and paid him that visit, which was May, 1869, see if you can recall how many years had elapsed between that visit and any visit you had ever made at his store?
A. I never was in his house.
Q. How many years since you had been in his store?
95 A. I never was in his store.
Q. How many years since you had talked with him on any matter of business?
A. I guess that was about 1837; he stopped me, but he did not talk about any business after he stopped me.
Q. You had not talked to him between 1837 and 1869?
A. No, sir.
Q. Did you know anything of his habits as a miserly man, or whether he was so?
A. All I have heard his brother told me; he was very stingy and very unpleasant; his brother told me so himself.
Q. Now, how were the brothers—did they make fortunes?
A. Well, no, sir; I guess they did not make much of a fortune, but they were comfortable.
Q. In this room, where you went last May, were there a great many papers?
A. I can't tell; I did not see any.
Q. Was there any case for papers, or trunks, or boxes?
A. No, sir; all that I told you was a table with nothing on, an old stove with a pan on it, and this chair.
Q. Was there any bed in the room?
A. No, sir.
Q. Do you know how many rooms he had?
A. I presume he had another room. I saw a door.
Q. You don't know about it?
A. No, sir.
Q. You saw no papers?
A. No, sir.
Q. You saw no secretary or writing-desk in the room?
A. No, sir.
Q. That was the first room you were shown into?
A. Yes, sir.
96 Q. What story was it?
A. The second story.
Q. In the Third avenue?
A. Yes, sir.
Q. Can you give the number of that?
A. No, sir.
Q. Can you tell about where it was?
A. I should judge it was somewhere up about Twenty-first street, pretty well up; I think so; I won't be certain; it was on the way I went there.
Q. At this time you knew that he had neither wife or child, did not you?

A. Yes, sir.
Q. At this time did not you think he looked wild?
A. Well, I thought he looked unpleasant. I don't know whether it was wildness.
Q. He always looked unpleasant to you?
A. Always.
Q. Did you ever see him when to you he did not look unpleasant?
A. No, sir; I don't know that I ever did.
Q. Did you ever see any but a man troubled with lunacy that looked unpleasant to you?
A. Well, I don't know how that is.
Q. Did you ever see any man that was not troubled with lunacy who talked in a rattling, random way, and changed the subject often?
A. No, sir; I don't know as I ever have; a man that was not troubled with lunacy would answer the question direct.
Q. You never saw any except those troubled with lunacy?
A. No, sir.
Q. Is it your judgment that all people that talk at random, and suddenly change from one subject to another, are troubled with lunacy?
A. Well, sir; I should think so.

97 Redirect:

Q. Were you in the habit of meeting him and seeing him in the street from 1837 to 1869?
A. Yes, sir, very frequently; I see him in the street, but I shunned him.
Q. Can you tell about the time when his wife died?
A. No, sir.
Q. Was it recently or months ago?
A. I guess it must have been some years ago. I don't know how long.

JOHN VAN NESS, called for contestants, sworn.

Direct examination by Mr. Vanderpoel:

Q. You are a physician and surgeon?
A. Yes, sir.
Q. How many years have you practiced?
A. Twenty-two years.
Q. Where do you reside?
A. Franklin avenue, Brooklyn.
Q. Did you know James Fox during his life-time, the brother of the testator?
A. I did.
Q. Did you know Charles Fox?
A. I did not.
Q. You never saw him?
A. No, sir.
Q. What has been the general nature of your practice?
A. It has been general practice.
Q. You have never made a specialty of any particular disease?
A. No, sir; not of insanity; no, sir.
Q. In your preparatory studies, before entering upon the practice of your profession, did you have occasion to attend lectures and read works on diseases of the mind?

98 A. Yes, sir.

Q. Have you since that time had occasion and opportunities for studying mental diseases?

A. Not to any very considerable extent.
Q. Have you had some?
A. Well, some, yes, sir; there are cases that have come under my own observation.
Q. Cases have from time to time occurred in the course of your own practice?
A. Yes, sir.
Q. While you never have made a specialty of the study?
A. Yes, sir.
Q. Have you been present during any portion of the trial of this case?
A. I was present on one occasion.
Q. About when was that?
A. I think that was the first assembling.
Q. When Mrs. Murawski and Mary Fox were examined?
A. Yes, sir.
Q. Did you also hear the testimony of Mr. Alphonse?
A. Yes, sir.
Q. And of Mr. Ferguson?
A. I won't be sure as to that name; I was present during the whole of that sitting.
Q. Did you hear the testimony given by those witnesses?
A. I did.
Q. Have you since that time examined the notes of the evidence given by those witnesses, as taken by the stenographer, or as you understood it was taken by him?
A. I have.
Q. From the statements of the witnesses at that time, given in your presence, on the stand, did you form any opinion as to the soundness or unsoundness of the testator?

(Objected to that the witness is not shown to be an expert.)

99 Cross-examination by Mr. Pierrepont:

Q. You live in Brooklyn, and have lived there many years?
A. Yes, sir.
Q. You have not made insanity or diseases of the mind a special subject of study.
A. No, sir.
Q. You would not consider yourself an expert in that department of your profession, would you?
A. No, sir.
(Objection renewed.)
Q. (By the surrogate.) Did you ever have any cases of insanity which you have treated?
A. Yes, sir.
Q. How many?
A. Perhaps fifty in my time.
Q. You treated those cases?
A. Yes, sir.
Q. (By Mr. Pierrepont.) Do you consider yourself competent to speak as an expert, from the testimony of others, about this delicate question of insanity from your experience?
A. Well, sir, it is a pretty difficult question to answer; some might consider me so, in a comparative point of view; I don't consider that I am, compared to very many who have had opportunities far exceeding anything I have had, to give an opinion in these matters.

Q. When you speak of the number of cases that you have had, do you mean that you have treated cases of insanity, and made that your business to treat them through their varied stages—I mean those you have had?

100 A. I have had no case of insanity that I have treated to the termination of the disease—no case. The cases that have come under my observation have been cases that have ultimately been sent to our public institutions.

(The objection to witness not being competent to testify is overruled; exception taken.)

Direct continued:

Q. From the statement of the witnesses at that time, given in your presence, on the stand, did you form any opinion as to the soundness or unsoundness of the testator?

A. I did.

Q. State what your opinion was on that subject.

(Objected to; objection overruled; exception taken.)

A. My opinion was that he could not have been a man of sound mind.

Q. Is there such a disease as hereditary insanity?

(Objected to; objection overruled; exception taken.)

A. It is usually classed as a disease, although physiologists do not regard it as a disease; but medical authors and writers usually treat it as a disease, and it is classed with rheumatism and gout, and hydrocephalus and scrofula, and all those forms as a disease; that is the usual view taken by medical authors.

Q. As a disease, is it hereditary?

101 A. It is, undoubtedly.

Q. Did you know the father of Charles Fox?

A. No, sir.

Q. You never saw him?

A. No, sir.

Cross-examination by Mr. Pierrepont:

Q. When you gave an opinion from the testimony of the witnesses, Mrs. Murawski and Mary Fox, your opinion was given upon the supposition that all they had stated was true?

A. It was.

Q. Not from any knowledge of your own?

A. No, sir.

Q. But as taking the facts they testified to as being strictly true; upon that you based your opinion?

A. Yes, sir; upon that I discriminated somewhat in having heard the cross-examination; I discriminated in regard to what was recognized as true in the premises.

Q. Do you think that if those statements which you heard, and on which you based your opinion, were true, that the man could not be competent to do business?

A. I think he might.

Q. You think he might be competent?

A. Yes, sir.

Q. Do you think he would be able, intelligently, to carry on a large business?

A. If you mean by that successfully, I think he might.

Q. I do mean successfully?

A. I think he might.

Q. Do you think that such a man as that would be responsible for any act of his, whether it be criminal or fraudulent?

A. I have not considered that point.

Q. You say you think he would be able to carry on business
102 successfully. If he undertook to commit a fraud in business, do you think he would be morally responsible in your judgment? Would you say such a man was responsible for a fraudulent act committed in business?

A. I should hardly think he was—I should hardly think so; still, I should like to consider that point very considerably more than I have before being satisfied fully in my own mind; I should hardly think, however that he was.

Q. Do you think he would know how one result would follow a given act, or a given series of acts?

A. Yes, sir.

Q. Would you believe such a man as that competent to know the mode of carrying on business in the best way to meet with success?

A. As I said before, I think that might be the case; and we have instances of that being the case.

Q. Do you think such a man, if he made his will, would be competent to see the bearings of that will?

A. I should think he might—yes, sir.

Q. Do you think that if such a man should make a deed of his property, and execute it, and receive the money for it, would you think that such an act as he was competent to perform?

A. I should think he was competent as a man of unsound mind—that is, as a monomaniac.

Q. Would you consider him responsible to perform such an act as to make a sale of property and receive the pay?

A. I should certainly regard him as competent to do it.

Q. You would not consider him, then, an insane man when you say "not of sound mind;" won't you tell us what you mean by that?

A. Well, I mean that he may be very sane on most subjects—that in business matters he may be singularly shrewd and apt, and his monomaniacism may take that direction, and yet he may not be of sound mind; he may be insane on very many subjects.

103 Q. He may be a monomaniac upon the subject of business?

A. Yes, sir.

Q. Won't you explain to the court just what you mean by a monomaniac?

A. It means simply that a person may be sane on most subjects and insane on some particular subject.

Q. What was the particular subject in which you give your opinion that he was not of sound mind?

A. I should judge from the evidence that in his general—I should consider that he prosecuted his business with the aptitude and shrewdness of a monomaniac.

Q. On the subject of business?

A. Yes, sir.

Q. And that is what you mean?

A. That is what I mean.

Q. You have known a great many people, have you not, that seemed to be monomaniacs in some particular way?

A. Yes, sir.

Q. Would you consider, in all instances, where a rich man, who had acquired a fortune, was living in a very humble and mean way, so far

as expenditure went, and was saving every cent in the most miserly way—you would consider him a monomaniac upon that subject?

A. I should not, sir—not with the attending circumstances that you have now named, simply.

Q. What would need to be added to make him a monomaniac?

A. Well, the facts that have been presented in the evidence, in regard to which I expressed my opinion.

Q. And your opinion is, that upon that subject of business he was a monomaniac?

A. Yes, sir.

Q. Won't you give the reason why, on that subject of business, you regarded him as a monomaniac?

A. Because I consider that a person who gave such very decided evidence of unsoundness of mind could not prosecute a business successfully except upon that hypothesis.

104 Q. That he was a monomaniac upon that?

A. Yes, sir.

Q. That is your argument that convinces your mind?

A. That is my idea.

Q. Have you ever known men that were misers?

A. Pretty near. I don't know that I have in the true sense of the term.

Q. If you should know a man that was, in the sense you have spoken of, a monomaniac upon business, and devoted himself in the most miserly and exclusive way, up to the age of seventy years, to the acquisition of money, and should all of a sudden give it all away, would not you think that he was insane, or a monomaniac?

A. Yes, sir; I should.

Q. Did you regard the late Mr. Peabody as one of that kind, for he was exactly that man?

A. No, sir; he was saving, but not miserly.

Q. These witnesses, of whom you have spoken, did you read their cross-examinations?

A. No, sir; I was present at the cross-examination at the first sitting?

Q. But did you not hear the others?

A. No, sir.

Q. And you have not read it?

A. No, sir.

Q. But you did read the direct afterwards?

A. Yes, sir.

Q. But not the cross?

A. No, sir.

Q. Did you hear the cross-examinations?

A. Yes, sir.

Q. You listened to them?

A. Yes, sir.

Q. After that you read the direct-examinations?

A. Yes, sir.

Q. But not the cross-examinations?

A. No, sir.

105 Q. You are aware that a direct examination is sometimes somewhat varied by a cross-examination, are you not?

A. Yes, sir.

Q. There are a good many different views that people, who are physicians, entertain as to whether a man is of sound or unsound mind?

A. Yes, sir.
Q. Very varied?
A. Yes, sir; quite so.
Q. Is not it a very difficult thing to determine?
A. The exact line is very difficult.
Q. Do you find, from your experience as a physician, the same thing is true that others, who know most about it and study it most, are apt to think everybody crazy?
A. I cannot say that I have been of that mind.
Q. Have not you found that those who are devoting themselves very much to it—those who are living with insane people, are apt to think that most people are insane, more so than those who are not so much with them?
A. I don't know that that is the case.

Redirect.

Q. Did you notice the testimony with regard to his conduct toward his relatives, and his feelings towards them?
A. Yes, sir.
Q. And as to his fears of their poisoning his food?
A. Yes, sir.
Q. Did you regard him as a monomaniac on that subject—suspicious of his relatives?
(Objected to.)
Q. Were the facts testified to, indicating suspicions of his relatives, any evidence of insanity on that subject?
106 A. Net necessarily; no, sir.
Adjourned until Monday, April 25th, 1870, at twelve o'clock.

NEW YORK, *June 1st*, 1870.

Mr. Ritterband announced that Homer A. Nelson, esq., had been retained as counsel for the executors. Mr. Nelson appeared.

Contestants rest.
Adjourned until Monday, June 6th, 1870, at twelve o'clock.

NEW YORK, *June 6th*, 1870.

JOHN H. TRIPLER, called for proponents, sworn.

Direct examination by Mr. Pierrepont:

Q. Where do you live?
A. 386 Cumberland street, Brooklyn.
Q. Where do you do business?
A. 394 and 396 Grand street, New York.
Q. How long have you done business in that place?
A. Twenty-two years next September.
Q. What kind of business is it?
A. Men's furnishing goods.
Q. Did you know Mr. Charles Fox in his life-time?
A. I did.
Q. When did you first become acquainted with him, about how many years before he died?
107 A. Well, I have been intimately acquainted with him for the last ten years; I have known him as a customer longer than that.
Q. How near your store was his place?
A. Pitt street.

Q. How far from your store?

A. It is only a few blocks from my store; my store is between Suffolk and Clinton, and that is in Pitt street, near Grand.

Q. During these years how often did you see him?

A. Well, he used to come in several times a week—evenings; come in in the evenings often; oftentimes when he was passing in the daytime he would stop in.

Q. Did he use to stay there any length of time?

A. Sometimes he would be there hours at a time, talking.

Q. And how about his habits of a Saturday nights?

A. When ever we werebusy Saturday nights and needed any assistance, he would always take hold and help us—sell goods as if he belonged to the store.

Q. Did he do that frequently?

A. Very frequently, during our busy season.

Q. You knew him with great intimacy?

A. Yes, sir.

Q. During all this time, what did you find the condition of his mind as to shrewdness and good sense in business?

A. He was a good business man, so far as I saw.

Q. How did you find his mind as to soundness?

(Objected to. Objection sustained.)

Q. Did you have social intercourse with him in the way of dining?

A. We often used to take dinner and tea together; it was quite common; he would stop at my store, and we would go together.

Q. As to going on excursions?

108 A. We have frequently been to Rockaway and Coney Island, and such places.

Q. From all your long intercourse with him, social and business, the facts you have detailed here, will you state what was the opinion you formed as to the soundness of his mind.

A. I never saw anything out of the way about him, any more than anybody else.

Q. What would be your opinion as to his sanity?

A. I never have been led to doubt it, except from what I have seen in the papers.

Q. You never had a doubt of his sanity?

A. I never thought of such a thing before.

Q. Did you know any man more sane than he?

A. I did not.

Q. How were your relations as to intimacy and frequent meeting in 1864?

A. During the war he was in the store a great deal, as much so as any other time, because we were busy.

Q. And during the year 1864?

A. Yes, during the year 1864; during the war, all through, until he moved up town, we were quite thick together until he went up to Third avenue, and then we did not meet so often.

Q. Do you know when he did move up?

A. I could not tell the precise time.

Q. About when?

A. I could not tell much about that, because it did not make any impression on my mind.

Q. It was after 1865, some time?

A. Oh, yes, sir.

Cross-examined by Mr. Flynn:

Q. Do you say, during that long intimacy with him, you never noticed anything peculiar?

A. Nothing any more peculiar than I did about anybody; everybody has got their peculiarities.

109 Q. Relate some of the peculiarities you noticed in him.

A. I don't think of anything, just this moment, peculiar at all.

Q. Did he have the same peculiarities that other people have?

A. Yes; the same peculiarities that other people have.

GEORGE G. HALLOCK, called for proponents, sworn.

Direct-examination by Mr. Pierrepont:

Q. State your business.

A. Real-estate agent.

Q. How long have you been in it?

A. About twenty-three years.

Q. Where do you live?

A. I reside at 253 East Broadway.

Q. Where is your place of business?

A. The same place, at present.

Q. Did you know Mr. Charles Fox before he died?

A. Yes, sir.

Q. For how many years?

A. I suppose I have known him by sight twenty-five years; I knew his place of business and knew the man.

Q. How long did you know him personally, to converse with him, and have relations with him?

A. Oh, well, I knew him so as to speak to him in the street, and he would occasionally stop me, and we would have a little conversation, and go on.

Q. Did you ever have any business with him?

A. I never had no business, any more than my folks used to buy shoes at his store years ago.

Q. Did you have that relation with him of purchasing goods?

A. I did not, myself; some of my family used to purchase the shoes.

110 Q. Did you have anything to do with him, connected with the bills?

A. I used to pay the bills.

Q. Did you use to, to him?

A. Yes, sir.

Q. Did you continue to be acquainted with him?

A. Yes, I continued, but not business acquaintance.

Q. I mean acquaintance?

A. Oh, yes, sir.

Q. Did you use to talk with him?

A. Yes.

Q. Down to how near the time of his death?

A. I think the last time I saw him was in the winter of 1869.

Q. You knew him in 1864, did you?

A. Yes, sir.

Q. Did you have conversation with him during all these years?

A. Well, occasionally I would have conversations with him on the street merely, and sometimes I might meet him in the store, and we would have conversations.

Q. And what did you converse about?

A. I suppose different things. I remember the last conversation we had more particularly. I don't remember former conversations.

Q. You conversed about general affairs?

A. When we met generally—yes, sir—business affairs.

Q. You knew him well, then, for these many years?

A. Oh, yes, sir. I have known the man a good many years.

Q. And in these relations of which you have spoken, and different meetings and conversations of which you have spoken, have you formed any opinion as to the soundness of his mind, his intellect; and, if so, what was it?

(Objected to, that no conversations or facts have been detailed by the witness.)

111 Q. During the war, did you have conversation with him?

A. I could not say particularly about that—I know I did after the war.

Q. What were the conversations relating to?

A. Relating principally to real estate, and its inflation, with other things, and he asked my opinion whether I thought it would keep up at its present value, then, or whether it would recede again?

Q. And before that, did you have conversations about real estate?

A. I think I have, though I don't remember anything particular. We used to meet occasionally and stop.

Q. Did you have conversations about the general subjects of the day?

A. Yes, sir.

Q. About, for instance, political affairs?

A. I suppose we have, sometimes, but I don't remember anything definite about our conversations, only relating to general business—only that particular time that I saw him about real estate.

Q. Relating to general business, and your real-estate business?

A. Yes, sir.

Q. From these conversations, and acts, and declarations, what was your opinion as to his being of rational or irrational mind?

(Objected to. Objection overruled. Exception taken.)

A. I never had the least idea that the man was irrational on any subject that I ever conversed with him upon, but that he was perfectly rational—just as much as I was myself.

Q. Then of course you never supposed him in the least insane?

A. I did not—no, sir—never.

Q. Had you any doubt about it in your own mind?

112 A. None at all; such a thing never occurred to my mind—never had such a thought.

Cross-examined by Mr. Vanderpoel:

Q. Did you ever see him excited?

A. I never did—I don't think I ever saw him excited.

Q. Did you ever hear him speak of his relatives?

A. I never did—only his former wife—that is all.

Q. Those were mere casual conversations with him?

A. Yes, sir; I suppose so—merely casual. I frequently saw him, because I lived in the neighborhood where he resided a good many years.

Q. You never had any business transactions with him, only some little talk?

A. In reference to business and general matters.

Q. Asking your opinion about something?
A. Yes, sir; something like that.
Q. You never had any interest in any of his affairs, did you?
A. No, sir; I never had any interest.
Q. You never had any occasion to question his word in any way, had you?
A. Well, no; but I always believed that he was a truthful man.
Q. You never had any occasion to doubt his word in any shape or form?
A. No, sir.
Q. You never crossed him in any way?
A. I think not.
Q. It was always harmonious between you?
A. Yes, sir; perfectly so.
Q. There was never any occasion for any excitement in your conversations with him, was there?
A. Nothing special; we were all a little excited during the war, but I don't remember anything.
Q. Was he considerably excited during the war?
A. Not that I know of; I never saw him when I thought he was any way excited.
113 Q. He was not excited at all about the matters connected with the war?
A. I do not know whether he was or not; he never was in my presence.
Q. When did you get acquainted with him?
A. I got acquainted with him a number of years—good many years ago.
Q. How many years?
A. I suppose twenty-odd years ago.
Q. Did you know his father?
A. I cannot say that I did.
Q. Do you know whether his father did or did not die insane?
(Objected to.)
Q. Had you understood it?
(Objected to.)
Counsel for contestants offer the testimony, not as affirmative evidence of the insanity of the father, but to attest the strength to which the witness' attention has been applied to the mental condition of the deceased.
(Objection sustained; exception taken.)

Adjourned until Tuesday, June 14th, 1870, at 11 o'clock a. m.

NEW YORK, *June 23d*, 1870.

SARAH J. TITLER, called for proponents, sworn.

Direct examination by Mr. Ritterband:

Q. Where do you reside?
114 A. 726 Third avenue.
Q. Are you engaged in business there?
A. Yes, sir.
Q. What is your business?
A. Millinery and fancy goods, and Butterick's patterns.
Q. How long have you done business there?
A. A little over ten years.

Q. Did you know Charles Fox in his life-time?

A. I did, for many years.

Q. About how many years were you acquainted with him?

A. Well, sir, it is somewhere between thirty and forty years from the time he first moved in Division street; he moved to the second door from where I resided.

Q. You knew him when he lived in Third avenue?

A. I did; from the time I was first acquainted with him until a week or ten days of his death, I was in the habit of seeing him every once in awhile.

Q. Confine yourself more particularly to about the last ten years; how frequently did you see him and converse with him during that time?

A. Sometimes I would see him once or twice a week; sometimes not quite so often; my business demands my being out a great deal, and I would meet him very often, and always would have conversation with him about different things.

Q. Did you meet him in the street frequently?

A. Yes, sir.

Q. Did you see him at his house?

A. Yes, sir, I have; I guess it was about eighteen months ago; I went to his house with a friend to ask some advice of his about some business affairs of hers.

Q. Were you and this friend in the habit of consulting him on business affairs and taking his advice?

A. We have done so.

Q. You were very intimately acquainted with him then as a friend?

115 A. Yes, sir; I was acquainted with his wife very intimately and his mother also.

Q. Did you visit him during the life of his wife?

A. As neighbors we used to be in and out a great deal.

Q. So that you had good opportunities during those thirty or forty years of cultivating his intimate acquaintance?

A. Yes, sir.

Q. Do you recollect when you last saw him?

A. Well, it might be ten days; it might have been two weeks, but I think not, before his death.

Q. You have spoken of conversations frequently—business conversations?

A. Yes, sir.

Q. And other conversations?

A. Yes, sir; everything, almost.

Q. Upon every subject almost?

A. Yes, sir.

Q. During all these conversations and during all that time, did you observe anything to indicate unsoundness of mind?

(Objected to. Objection sustained.)

Q. State what you observed with reference to his conduct.

A. I always found him very gentlemanly; he behaved as other gentlemen do.

Q. (By the surrogate.) As to his intelligence, how was that?

A. I thought he was remarkably intelligent; he could converse on almost any subject.

Q. And you have conversed with him upon almost every subject?

A. Yes; certainly I have.

Q. He always conversed intelligently and rationally?

A. Yes, sir; certainly.

116 Q. From all the conversations that you have stated, will you give us your opinion as to whether he was of rational or irrational mind?

A. Well, sir, I suppose he was as much so as anybody I ever knew.

Cross examined by Mr. Vanderpoel:

Q. You never noticed anything peculiar about him?

A. No, sir.

Q. How old are you?

A. I am a little over sixty. I am about sixty-two.

Q. Did you ever have any business with him?

A. No, sir; nothing special. I have asked his advice sometimes in business transactions.

Q. You never saw him excited about anything?

A. I have seen him in deep sorrow when he lost his wife and little ones.

Q. He was very gloomy at those times?

A. I think he grieved very much.

Q. Did he grieve more than other men do under like circumstances?

A. No, sir; I don't know that he did.

Q. There was nothing peculiar about that?

A. No, sir.

Q. You never saw him under any peculiar circumstances?

A. No, sir; only those circumstances that are very trying to anybody.

ALBON P. MAN, called for proponents, sworn.

Direct examination by Mr. Pierrepont:

Q. How long have you been an attorney and counselor in the city of New York?

A. Over thirty years.

Q. How long have you known Mr. Fox, the maker of the will?

117 A. About eight or ten years.

Q. Will you state in what way you have known him, and what have been your relations?

A. He has been agent for some estates for the owners of whom I was counsel, and has frequently had occasion to call upon me upon that business; and I have seen him in some incidental matters also; mostly, however, in that way.

Q. And how many times?

A. I cannot specify the number; probably fifty times, probably more; a little less, perhaps.

Q. And in these business relations you had to do with him?

A. Yes, sir.

Q. And in whatever the others were that you spoke of, did you have conversations with him about other matters—other than business?

A. Yes, sir; frequently. He was quite social and conversed upon many subjects; sometimes upon the subject that most absorbed our attention during the time—that was the war and the general affairs of the Government.

Q. Did he show any special interest in that subject?

A. At the time of making his will, yes; and on other occasions, too.

Q. Did he say anything about the former war in which he was engaged; or what did he say on that subject?

A. He spoke of having been either in the service of the United States, or else performing work for the Government, during the war of 1812.

Q. State what he said showing interest in the subject of the war and of the United States.

A. I cannot give the identical words; but showing his warm interest during the progress of the war, his warm interest in the success of the United States Government; a general conversation, such as was a matter of daily matter of course with us during the war.

Q. Take the will before you. Do you see any remarks of your own upon that paper?

118 A. Yes, sir; I did notice a few words in pencil in two places.

Q. Won't you state under what circumstances you made those remarks, and the conversations between you and him in relation to it?

A. He called one day and exhibited to me the draft of a will which he had drawn, and asked me to look at it and see if it was correct—if it would answer the purpose; the substance of it was the same as this; I cannot say whether this was the paper that he showed me at that time; I should rather think not, although its provisions are similar; I think the language of this is a little more explicit—I mean to say a little more in legal form—than the one he first exhibited to me.

Q. When he exhibited to you the will, did you make any suggestions about the legal form?

A. I made some corrections upon it in pencil, more than I see upon this paper; that is, according to my recollection.

Q. That is, how to put it into the legal form?

A. Yes, sir; I cannot say that this is the legal form that I put it in, but it is similar.

Q. And this is similar to what you did advise him to do?

A. It is similar in effect; I cannot remember the words of my correction.

Q. You knew then the substance of the will he was about to make?

A. Yes, sir.

Q. Did he express to you any wishes on the subject?

A. Yes, sir; he expressed his wishes.

Q. What did he tell you?

A. He told me his intention was to leave his property to the Government of the United States for the payment of its debts, and I made some inquiry in regard to his situation as to relatives, and he gave me to understand——

Q. Give the substance.

119 A. The substance was that he had no relatives so near that he cared to give his property to them; he preferred giving it to the Government.

Q. To aid in payment of its debts?

A. Yes, sir; he seemed to have made up his mind deliberately to do that.

Q. You speak of his mind—that he seemed to have made up—what kind of intelligence did he show in relation to his business so far as related to his mind?

A. It was quite clear, quite business-like.

Q. And so far as related to all other subjects upon which he conversed?

A. Quite sensible.

Q. And at all times how was it?

A. I never saw any difference in that respect.

Q. Touching his mental condition, from all you saw of him—from these interviews of business and otherwise—what could you say?

A. Well, sir, I could say he was quite intelligent and understood very well what he was doing.

Q. What would you say as to the soundness or unsoundness?

A. I never saw any indication of unsoundness of his mind.

Q. Nothing that led you to any such belief?

A. Nothing of the kind; quite the contrary.

Q. You have seen him write, have you not?

A. Yes, frequently.

Q. Will you state in whose handwriting the body of the will propounded is?

A. It looks like his.

Q. Have you any doubt it is his?

A. I should say it was his from my general knowledge of the character of his writing; I have noticed his signature.

Q. Will you look at the book before you (hands witness a book) and state, in your opinion, whose handwriting that is?

A. It looks like his.

120 Q. You believe it to be his?

A. Yes, sir. It looks decidedly like his as I turn it over. He has rendered me accounts on several occasions, and I have seen him write frequently. I could not be positive as to the writing there, but it bears every resemblance to his writing, and I should think it was his.

Q. You believe it to be his?

A. Yes, sir.

(Counsel for the United States offers in evidence said book, which purports to be a diary of the testator.)

Q. Won't you state how he was as to manner in business?

A. Quite regular. Quite exact in accounts.

Q. As to being methodical?

A. He was decidedly so. He was particularly so in regard to the accounts that he rendered to me, and this business of Mrs. Dean's, about which he called upon me many times, was very complicated, and he showed a great degree of intelligence in regard to it.

Q. How as to his clearness in understanding and unraveling the complications?

A. He was quite equal to ordinary business men in that respect.

Cross-examined by Mr. Vanderpoel:

Q. Did you know he had any relatives?

A. Only from his own statements.

Q. Did you know from his own statements that he had any relatives?

A. I only knew from what he said. He signified to me that he had none near enough that he cared to give his property to them.

Q. Did he say how near they were?

A. I understood quite remote.

Q. How many degrees off, four or five?

121 A. I should infer that he had neither children, parents, nor, probably, brothers or sisters. I think that would be the effect of his conversations.

Q. Anything as to nephews and nieces—can you tell?

A. I could not be positive. I don't know that I pursued the inquiry closely—beyond a general expression.

Q. You understood him to say that he had no brothers living?

A. That he had no relatives near enough to care to give his property to.

Q. Did you inquire anything about his family?

A. I inquired whether he had near relatives to take his property, or such. He made the expression to me that he had not.

Q. You inferred from his conversation that he had no brothers or sisters living?

A. That he had no near relatives. I should infer from his conversation that he had not.

Q. According to his general conversation, he gave you to understand that he had no brothers or sisters living?

A. I cannot say that he said that, positively.

Q. And you did not ask?

A. I asked him whether he had not relatives, or else he said to me that he had none near enough to leave his property to them.

Q. You did not ask whether he had any brothers?

A. I may have done so. I only inferred from the conversation that he had none near enough—no immediate relatives—none that were near to him.

Q. You did not draw this will, did you?

A. My impression is that the original draft which he presented to me I only corrected in pencil.

Q. Do you know where that original draft is?

A. No, sir. He took it away with him. It is possible this may
122 have been the paper, and that the balance of my pencil-marks—the other pencil-marks—may have been erased, though I don't see any signs of it.

Q. When did you put any pencil-marks on this paper?

A. It was in his own hands. My inference from seeing this with so few pencil-marks on it is that he probably brought it back to me after he had executed it, but that I cannot say. I cannot say that I spoke to him more than once on the subject of his will. This may have been the identical paper he showed me; it is the same in purport, but I remember making more corrections than appear upon this paper.

Q. Do you know whether you saw it after it was executed until after *its* death?

A. I take it I must have seen this after it was executed; I should judge so. I cannot say—be positive whether I saw it after or before it was executed; I certainly saw it after it was prepared as it is now.

Q. Did you ever hear him speak on any other occasion of his relatives?

A. I cannot be positive as to that.

Q. Have you any recollection of it?

A. I had quite a long conversation with him, almost the last interview, traveling from my own house to Mrs. Dean's and back again; a variety of conversation.

Q. I want to know if you remember his making any reference to his relatives on any other occasion than the one when the draft of will was shown you?

A. I have no distinct recollection.

Q. Have you any recollection?

A. No, sir; you may say I have no recollection.

Q. Did you learn from him whether he had ever been married?

A. I don't recollect that.

Q. Did you ever hear him speak unkindly of his relatives, or of any relatives?

A. No, sir.

Q. When you were with him, did he talk much of the war?

123 A. Well, I don't know that it was a great deal; it was a matter of conversation with every one that one met in those times.

Q. Was there anything peculiar about him in that respect?

A. Nothing except his loyalty.

Q. That was a peculiarity; do you mean that was something peculiar to him?

A. I don't know that it was more peculiar to him than to any others.

Q. I asked whether there was any peculiarity?

A. It was very decided.

Q. Do you mean that he was opposed to the war?

A. No, sir; quite the contrary.

Q. Then there was no peculiarity about him in that respect?

A. Nothing more than his distinct loyalty, if you call that a peculiarity.

Q. You never heard him say much on the subject?

A. Yes, sir; a good deal.

Q. (By Mr. Flynn.) Did not you draw the original will, or the one that was presented to you for correction, and did not you correct it by inserting "to the Secretary of the Treasury for the time being?"

A. Well, I should rather think so, but I cannot be positive.

Q. You do not hold yourself responsible for that peculiar expression in the will?

A. No, sir; I made such correction on his draft that I thought would be entirely effectual to answer his purpose. This is my impression—not that the money was to be given to the Secretary of the Treasury, but that was the channel of payment, but I cannot say positively as to that.

SAMUEL T. BROWN, called for proponents, sworn.

Direct examination by Mr. Pierrepont:

Q. What is your occupation?

124 A. I am vice-president of the Mechanics and Traders' Bank in this city.

Q. Did you know Mr. Fox in his life-time?

A. Yes, sir.

Q. State how long you knew him, and in what way you knew him.

A. I have known him some six or seven years as a depositor with us.

Q. How often did you see him?

A. Possibly once a month—it might have been oftener.

Q. Did you ever have conversation with him?

A. Nothing more than passing the time of day, or something relating to his banking-business.

Q. Did you have those conversations?

A. Yes, sir.

Q. Will you state how he was as to the manifestation of intelligence and clearness in his business?

A. I never had any reason to doubt it; he seemed to understand what he was about, and knew perfectly well what he was doing.

Q. As well as any other man?

A. As well as any other man.

Q. In those business relations of which you speak, you observed his kind of mind; I suppose you did?

A. No more than I would with any one else that came in.

Q. The same as you would with any one else?

A. Yes, sir.

Q. Did you observe anything in his mind that was indicative of any unsoundness?

A. No, sir.

Q. You found him as sound as any man, did you?
A. Yes, sir.

Cross-examined by Mr. Vanderpoel:

Q. Did you ever pay any attention to him?
125 A. No more than I would to any one else that came in, ask me a question about business matters, or pass the time of day.
Q. Pass the time of day, saying merely, "Good morning," or "How are you?"
A. That is all.
Q. Do you remember his coming to ask you any question?
A. Yes, sir; he came in once or twice or three times, and asked when I had heard from Mr. Price, a gentleman for whom I think he was agent, collecting rents.
Q. That is all you ever knew of him?
A. Yes, sir.
Q. You never had any other business transactions with him, or any social intercourse with him in any shape or form?
A. No, sir.

WILLIAM MILES, called for proponents, sworn.

Direct examination by Mr. Pierrepont:

Q. Please state your occupation.
A. My regular business is hides and leather; I am engaged now in the banking business; I am president of the Six-Penny Savings Bank at present.
Q. Did you know Charles Fox in his life-time?
A. I did.
Q. How many years?
A. I should think some thirty years, more or less.
Q. In what way did you know him for these thirty years?
A. I knew him from having seen him frequently in my brother's store, and I have been into his store, and I have met him good many times during the war; that period I never had any particular communication with him.
Q. During these thirty years had you conversations with him?
A. To some extent—yes, sir; very slightly, though.
126 Q. How was he in his business affairs, so far as it was manifested in his business?
A. I always looked upon him as a remarkably safe, prudent, and sound man myself.
Q. And how in his attention to business and carefulness?
A. Very careful and very attentive.
Q. How in the intelligence that he manifested did you find him?
A. I should class him as a man of superior intelligence.
Q. And how as to soundness of intellect?
A. Pefectly sound.

Cross-examined by Mr. Vanderpoel:

Q. Did you ever have a business transaction with him?
A. No, sir; not myself. He used to deal in my brother's store.
Q. Did you ever know any of his relatives?
A. No, sir.
Q. Do you know whether he had any brothers or sisters?
A. I do not.
Q. Have you seen much of him during the last ten years?

A. Well, I used to meet him every once in a while.
Q. How meet him—just casually in the street, and say how do you do?
A. Yes.
Q. Is that about all you have known of him for ten years past?
A. Yes, sir.
Q. You had no other intercourse with him for ten years, only as you would meet him in the street and pass the time of day and pass on about business?
A. That is all.

127 Redirect:

Q. What were you about to say about his business?
A. He dealt with my brother-in-law, a few doors below where he kept store; I seen him there and observed his manner of doing business, and have conversed with my brother-in-law in relation to him.

Recross:

Q. How long ago was the last you saw him there?
A. It must have been ten or twelve years ago.

JACOB MILES, called for proponent, sworn.

Direct-examination by Mr. Pierrepont:

Q. Did you know Charles Fox in his life-time?
A. Yes, sir.
Q. How many years did you know him?
A. I had business with him for about twenty years or less.
Q. How many times have you seen him; have you seen him many times?
A. During that time I used to see him probably once every week or two.
Q. In what way did you see him?
A. I used to sell him leather.
Q. Did you often see him?
A. Yes, sir.
Q. And in that business he was in your store?
A. Yes, sir.
Q. Were you in his store?
A. Yes, sir; not often, however.
Q. Did you see your brother there, that has just testified, in your store?
A. I don't remember that I did.
Q. He was often in your store, your brother?
A. Yes, sir; frequently.

128 Q. How did Mr. Fox appear as a business man?
A. Quite correct.
Q. How as to be methodical and careful?
A. Very much so.
Q. How as to showing intelligence, clearness, and preception?
A. Very much so; more than the generality of those that came in my store.
Q. How as to soundness of intellect?
A. I once had occasion somewhat to doubt his intellect—to doubt what he was talking about; he used to talk a great deal about buying real estate; I supposed that he was comparatively a poor man, but he used frequently to speak of going down to the Exchange and talk about buying a great deal of real property. I inquired of a neighbor, and to

know if he was a rich man, and had made those purchases; he said "No," he was insane.

Q. How did you find him?

A. I found him quite correct in everything, and quite intelligent in everything.

Q. How did you find him as to soundness of mind?

A. Quite so; I saw nothing to indicate any doubt, except that I did not suppose he had so much property; he was doing a small business.

Q. You were surprised afterwards to find he had?

A. I did not know anything about it until I saw the account of his will; then I supposed what he was talking about was correct.

Cross-examined by Mr. Vanderpoel:

Q. Who was that neighbor that told you he was insane?

A. His name was John Nightingale, a man in the same business with himself—shoe business.

Q. Where?

A. He was within a door or two of Mr. Fox.

Q. Where is he now?

129 A. The last I knew of him, he was somewhere in the Eighth avenue in this city.

Q. From his conversation on that subject, you thought he was queer, didn't you?

A. No; I asked this neighbor if he was a wealthy man; he said no; he said he was insane talking about real estate.

Q. How many years ago was that?

A. Fifteen or twenty years ago.

Q. You have not known much of him the last ten or twelve years?

A. No, sir.

Q. What amount of real estate did he speak of buying?

A. To the best of my recollection, he talked of buying real estate to the value of twenty thousand dollars and odd.

Q. That he had bought?

A. Yes, sir; I think he mentioned that he had bought it in connection with his brother; if I recollect right, there was something said about his brother; I don't know what it was.

Q. Do you know whether he really had any real estate at that time or had bought any?

A. Only from his conversation.

Q. When again did he speak of it?

A. I have heard him speak of it several times, perhaps three or four times.

Q. Fifteen or twenty years ago?

A. Yes, sir; about attending the sales at the Exchange, and talking about real estate up town.

Q. Large amounts?

A. Yes, large amounts for him; he was doing a small business. I supposed he was a man of small means; his purchases were small; his business was small.

Q. You never met him in a social way?

A. No, sir.

Q. Did you ever hear of his going off and leaving his store open?

130 A. No, sir.

Q. Going away and leaving the door open, with no one in charge?

A. No, sir.

Q. You heard very little about him, I suppose?
A. Only from this neighbor.

Redirect:

Q. He did buy that real estate, I suppose?
A. I don't know.
Q. You do not know that he did not?
A. No, sir.
Q. Don't you know that the records show that he did, and he has got it still?
A. I paid no attention to it.
Q. You had no idea he was a man of so much wealth?
A. No, sir.
Q. And this neighbor had not?
A. No, sir.
Q. He thought it was surprising?
A. I presume so, from the remark he made to me.

Recross:

Q. Had he any other property at that time, any further than his store, so far as you know?
A. No, sir.
Q. Have you seen him any during the last fifteen years?
A. I do not think I have seen him, to speak to him, during the last ten years.

JULIET BOSWORTH, called for proponent, sworn.

Redirect examination by Mr. Pierrepont:

Q. Tell me your name before marriage.
A. Juliet Dean.
Q. Are you a daughter of Mrs. Dean, that had business relations with Mr. Fox?
A. Yes, sir.
131 Q. Did you know about those business relations?
A. Yes, sir.
Q. Did you know Mr. Fox in his life-time?
A. Yes, sir.
Q. How often did you see him?
A. Since my brother's death I saw him more frequently; sometimes he would be up two or three times a month, and sometimes two or three times a week; sometimes he would be up once in two months.
Q. During what years were these visits?
A. Well, it is since May, 1868, that my mother had charge of the business my brother had.
Q. And between May, 1869, and the time of his death, how often did you see him?
A. Quite frequently; two or three times a month.
Q. Had he any agency before that for the husband?
(Counsel for contestants object to any testimony regarding matter that occurred since the making of the will. Question withdrawn.)
Q. Prior to 1864, where did you know him?
A. He came to the house, I think; I have been personally acquainted with him for the past eight years, I could say; I saw him come to the house, but of course I was not as well acquainted with him as I was afterwards.
Q. During that acquaintance had he business relations then?

A. Yes.
Q. What were they?
A. Business relations with my brother.
Q. And you saw him?
A. Yes, sir; I saw him.
Q. Did you see him often?
A. Yes, sir.
Q. Will you state what were his indications of intellect, as to his clearness and method?
132 A. I had no reason to doubt as to his clearness of mind. I think he was a man of more than ordinary ability; more than ordinary intellect.
Q. As to his soundness of mind?
A. I never had any reason to doubt it.
Q. And you have no doubt of his sanity?
A. No, sir; no doubt.
Q. No more than you have of any other person?
A. No, sir.

Cross-examined by Mr. Vanderpoel:

Q. I suppose you paid no particular attention to him before 1864?
A. He came to the house, of course, and I saw him more or less frequently.
Q. You paid no particular attention to him?
A. Just the same as I would to any acquaintance of the family; say, how do you do? Sometimes I was in the room during his business relations, and sometimes not.
Q. You had no business with him until 1868?
A. No, sir.
Q. You knew nothing of his family—his brothers?
A. No, sir. I knew he had a brother, and I have heard him speak of his wife and mother.
Q. How recent did you know he had a brother?
A. I heard him speak of his brother last winter.
Q. Did he speak kindly of him?
A. Yes, sir. He seemed to rather regret that there had been some trouble between them. The nature of that trouble I do not know. It was the only time I ever heard him speak of his brother.

ADONIJAH H. BROWN, called for proponents, sworn.

Direct examination by Mr. Pierrepont:

Q. How long did you know Mr. Fox prior to his death?
133 A. I think some twelve or fifteen years.
Q. During those years how often did you see him?
A. Well, it would be hard for me tell how often. I used to meet him frequently; he used to come in my store occasionally, and I would meet him in some of the neighbors' stores.
Q. Did you have any business relations with him, or know of his doing any business?
A. I don't remember that he was in any business when I first knew him.
Q. What did you hear him conversing about?
A. Well, the general topics of the day; a little on war topics and general things; sometimes on business matters.
Q. You were called by him as one of the witnesses to his will, I think?
A. Yes, sir.

Q. Where did he live prior to 1864?

A. He lived somewhere in our neighborhood, but I really don't know what street he did live in; it was close by somewhere; he lived in our neighborhood, in Thirteenth ward, I think.

Q. On these occasions when you saw him what did you see him about? Was it by accident or appointment?

A. More by accident. I never had any particular appointment.

Q. And these conversations on the war were such as you would have with any acquaintance?

A. Yes, sir.

Q. State how he was as to intellect.

A. I consider him perfectly sound.

Q. And as to clearness of mind?

A. I thought he was perfectly clear on every subject he conversed on.

Q. You saw nothing to indicate unsoundness?

A. No, sir.

Cross-examined by Mr. Vanderpoel:

Q. Did you hear him speak of his relatives?

134 A. Not particularly. He spoke, I think, of having a little difficulty with a brother. I might have heard him say something about that.

Q. Did you know that brother?

A. No, sir.

Q. When was it he spoke of having a difficulty with his brother?

A. I don't know when he had the difficulty. I think he spoke of it somewheres about the time the will was signed. I cannot give the precise date.

Q. Did he speak unkindly of him?

A. Not very. He seemed to be on rather bad terms with him.

Q. What did he say?

A. I could not tell.

Q. It was only an impression on your mind that there was some unfriendliness on his part towards his brother?

A. Yes, sir.

Q. Did you know where his brother lived?

A. No, sir.

Q. Did you ever go to see him, Charles Fox, socially?

A. Not particularly. I used to meet him very often in the stores around the neighborhood.

Q. Were you in the same business with him?

A. No, sir.

Q. Did you have any business relations with him?

A. No, sir; no buying or selling or trading. I might talk on business subjects sometimes.

Redirect:

Q. Did he tell you any cause of his unfriendly feelings towards his brother? Did he give you any reason for it or not?

A. I don't remember that he did. He never stated anything particular about it. I have a slight impression he spoke about it. I never asked him any particulars, that I remember.

135 Q. You did not ask him why he was unfriendly, and he did not tell you?

A. No, sir; I don't remember that I did.

Q. Does that remind you of anything connected with the war, his unfriendly feeling towards his brother?

A. I don't remember.

Recross:

Q. Did he speak of his brother enlisting and going off in Wilson's Zouaves?

A. Not to me.

Adjourned until Thursday, June 30th, 1870.

At a surrogate's court, held in and for the county of New York, at the surrogate's office, in the city of New York, on the twenty-fourth day of March, in the year one thousand eight hundred and seventy-one.

Present, Robert C. Hutchings, esq., surrogate.

IN THE MATTER OF THE PROBATE OF THE alleged last will and testament of Charles Fox, deceased.

The petition of the United States of America, by Edwards
136 Pierrepont, esq., United States district attorney for the southern district of New York, having been duly filed in this court on the 12th day of February, 1870, representing among other things that said petitioner was the sole legatee named in the last will and testament of Charles Fox, late of the county of New York, deceased, and that said deceased was, at or immediately previous to his death, an inhabitant of the county of New York, and departed this life in said county on the second day of February, 1870, leaving a last will and testament, relative to both real and personal estate; and said petition praying that said alleged last will and testament might be proved and letters testamentary granted thereon, according to law; and satisfactory proof having been made of the due service of the citation heretofore issued in this matter, requiring the proper parties to appear in this court on the twenty-sixth day of February, 1870, and attend the probate of the said last will and testament of said Charles Fox, deceased; and said petitioner, the United States of America, having appeared by said Edwards Pierrepont, esquire, United States district attorney for the southern district of New York, and by John M. Cooney, esq., as proctor and attorney, and by said Edwards Pierrepont, esq., as counsel, and O. H. Brummell, one of the persons named as one of the executors in said alleged will, having appeared by Pinckney and Spink, esqrs., as his attorneys and proctors, and David Hays, the other person named as an executor in said alleged will, having appeared by J. Solis Ritterband, esq., as his attorney and proctor in support of the proofs of said alleged will, and Benjamin N. Disbrow, the general guardian of Anne Fox, Joseph Fox, and George Fox, minors and heirs-at-law, being respectively niece and nephews, children of James Fox, a deceased brother of said Charles Fox, deceased, having appeared in person and by James Flynn, esq., as proctor and attorney of said general guardian, and by Jacob Hardenburgh, Aaron J. Vanderpoel, and Samuel Hand, esqs., as counsel
137 for said general guardian in opposition to the probate of said alleged will, and no other parties having appeared herein, and (besides other objections to admission to probate) under and by virtue of section 11, chapter 359, of the Laws of the State of New York, passed April 22d, 1870, the validity of the dispositions contained in said alleged will having been contested, and their construction and legal effect having been called in question in said proceedings of probate, by general guardian of said nephews and niece, being heirs-at-law and next of kin of said deceased, to wit, the questions of validity, construction, and legal effect hereinafter determined; and the said matter having been duly heard and adjourned from day to day until this day, and the said

alleged will and instrument in writing bearing date the 16th day of July, 1864, purporting to be the last will and testament of Charles Fox, deceased, having been produced, and the subscribing witnesses to the said instrument having been duly examined touching the facts and circumstances attending the execution thereof, and the competency of the said Charles Fox to execute the same as and for his last will and testament, and after hearing the proof and allegations of the respective parties, and the arguments of the respective counsel in respect thereof, and of the aforesaid questions of validity, construction, and legal effect, and due deliberation being thereon had:

It is now adjudged and decreed, and the surrogate of the county of New York, by virtue of the power and authority in him vested, doth adjudge and decree:

1st. That the instrument so propounded for probate is the last will and testament of said deceased, Charles Fox.

2d. That the said Charles Fox was, at the time of making and publishing the said instrument, of sound and disposing mind, memory, and understanding.

138 3d. That the said instrument was signed, witnessed, and in all respects executed by said Charles Fox as his last will and testament, according to the requirements of the statute in such case made and provided.

4th. That said last will and testament is inoperative, invalid, and void as a devise of real estate.

5. That said petitioner, the United States of America, is not entitled to and cannot lawfully take, receive, or hold as devise in trust or otherwise, under said last will and testament, the real estate devised thereby or any part thereof.

6th. That the real estate of the said Charles Fox, deceased, descends to his heirs-at-law.

7. That said petitioner, the United States of America, is the same artificial person or body politic and corporate described in said last will as "The Government of the United States at Washington, District of Columbia."

8th. That the said last will and testament is valid and operative as to the personal estate of the testator.

9. That as to the personal estate, the petitioner, the United States of America, is the sole legatee under said will after the payment of all lawful debts.

10. That no lawful trust as to real or personal estate is created by or vests under said will in the petitioner, the United States of America.

11th. That as to personalty, the bequest in said will to petitioner is not operative as a trust, but as an absolute gift. The terms of said bequest respecting the purpose thereof constituting no legal restriction upon the use of the legacy.

139 12th. The said instrument is admitted to probate as a will of personal estate only.

All questions of costs, expenses, and allowances in this matter are hereby reserved until the further order of this court.

ROBERT C. HUTCHINGS, *Surrogate.*

N. Y. supreme court, county of New York.

IN THE MATTER OF THE ALLEGED LAST WILL and testament of Charles Fox, deceased.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
ANNIE FOX, JOSEPH FOX, GEORGE FOX, BENJAMIN N. DISBROW, DAVID HAYS, and A. A. BRUMMELL, respondents.

Please take notice that the appellant in the above-entitled matter appeals to the supreme court of the State of New York from the judgment order or decree of the surrogate of the county of New York in the
140 above-entitled matter, entered in the surrogate's court on the twenty-fourth day of March, 1871.

Dated April 14th, 1871.

JOHN M. COONEY,
Attorney for Appellant.

To JAMES FLYNN, Esq.,
Attorney for Benjamin Disbrow, Guardian for Annie Fox, Joseph Fox, and George Fox.

Know all men by these presents that we, Charles K. Graham and Willard Bullard, of the city of New York, are held and firmly bound unto the people of the State of New York in the sum of two hundred and fifty dollars, lawful money of the United States of America, to be paid to the said the People of the State of New York, or to the assigns thereof; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated the 14th day of November, one thousand eight hundred and seventy-one.

The conditions of the above obligations are such that if the United States of America shall diligently prosecute an appeal taken from a decree of the surrogate of the county of New York, entered on or about the 24th day of March, 1871, in a certain proceeding before the said surrogate in the matter of the probate of the last will and testament of Charles Fox, deceased, and shall pay such costs as may be based against the appellant, in the event of the appellant's failure to obtain a reversal of the decision so appealed from, then this obligation to be void; otherwise to remain in full force and virtue.

CHARLES K. GRAHAM. [L. S.]
WILLARD BULLARD. [L. S.]

Sealed and delivered in the presence of—
JOHN M. COONEY.

141 STATE OF NEW YORK,
City and County of New York, ss:

On this 14th day of November, one thousand eight hundred and seventy-one, personally appeared Charles K. Graham and Willard Bullard, to me known to be same individuals described in and who executed the foregoing bond, and severally acknowledged to me that they executed the same.

JOHN M. COONEY,
Notary Public, N. Y. County.

CITY AND COUNTY OF NEW YORK, *ss:*

Charles K. Graham, the within named, being duly sworn, doth depose and say that he resides at No. 207 East Thirty-fourth street, in said city, and is worth the sum of two hundred and fifty dollars over and above all his just debts, liabilites, and responsibilities, and property exempt from execution.

CHARLES K. GRAHAM.

Sworn to before me this 14th day of November, 1871.

JOHN M. COONEY,
Notary Public, N. Y. County.

CITY AND COUNTY OF NEW YORK, *ss:*

Willard Bullard, the within named, being duly sworn, doth depose and say that he resides at No. 319 West Thirty-first street, in said city, and is worth the sum of two hundred and fifty dollars over and above all his just debts, liabilities, and responsibilities, and property exempt from execution.

WILLARD BULLARD.

Sworn to before me this 14th day of November, 1871.

JOHN M. COONEY,
Notary Public, N. Y. County.

142 N. Y. supreme court, county of New York.

IN THE MATTER OF THE ALLEGED LAST WILL and testament of Charles Fox, deceased.

THE UNITED STATES OF AMERICA, APPELLANT, *vs.* ANNIE FOX, JOSEPH FOX, GEORGE FOX, BENJAMIN N. DISBROW, DAVID HAYS, and A. H. BRUMMELL, respondents.

Please to take notice that the appellent in the above entitled action appeals to the supreme court of the State of New York from the judgment order or decree of the surrogate of the county of New York in the above-entitled matter, entered in the surrogate's court on the 24th day of March, 1871.

JOHN M. COONEY,
Attorney for Appellant, 117 Nassau st., New York City.

To JAMES FLYNN, Esq.
PINCKNEY & SPINK, Esq.,
J. SOLIS RITTERBAND, Esqs.,

143 N. Y. supreme court, county of New York.

IN THE MATTER OF THE ALLEGED LAST WILL and testament of Charles Fox, deceased.

THE UNITED STATES OF AMERICA, APPELLANT, *vs.* ANNIE FOX, JOSEPH FOX, GEORGE FOX, BENJAMIN N. DISBROW, DAVID HAYS, and A. H. BRUMMELL, respondents.

The petition of appeal of the United States of America, appellant in the foregoing-entitled cause, exhibiting this their appeal by John M.

Cooney, their attorney duly appointed, respectfully shows to this court:

That the said United States of America is the sole legatee named in the last will and testament of Charles Fox, late of the city of New York, deceased.

That the said Charles Fox, after having in due form of law made and published his last will and testament to pass real and personal estate, died at the city of New York, on the second day of February, in the year one thousand eight hundred and seventy, aged sixty-nine years and upwards, seized and possessed of and well-entitled unto a large real and personal estate, amounting in value to more than one hundred thousand dollars.

144 That after the death of said Charles Fox, and during the month of March, one thousand eight hundred and seventy, the appellant, by Edwards Pierrepont, then the United States district attorney for the southern district of New York, produced before the surrogate of the county of New York, and propounded to him for probate as a will of personal and real estate, a certain paper-writing purporting to be the last will and testament of the said Charles Fox, deceased, bearing date the sixteenth day of July, one thousand eight hundred and sixty-four.

That the appellant, your petitioner, by Edwards Pierrepont and John M. Cooney, as counsel, duly appeared before the said surrogate, and such proceedings were thereupon had before the said surrogate that the respondents Anne Fox, Joseph Fox, and George Fox, the next of kin of said Charles Fox, deceased, appeared by Benjamin N. Disbrow, their guardian, in person, before said surrogate, and contested the validity of said alleged will and its admission to proof or probate as aforesaid, and were the only contestants.

That the proceedings before said surrogate in the matter of proving the said alleged will were duly continued from time to time, and proof therein having been taken, and the allegations of the parties appearing having been heard, the said surrogate, on the twenty-fourth day of March, one thousand eight hundred and seventy-one, made and entered a decree, as said surrogate, in the matter aforesaid in substance as follows:

145 At a surrogate's court held in and for the county of New York, at the surrogate's office in the city of New York, on the twenty-fourth day of March, one thousand eight hundred and seventy-one.

Present, Robert C. Hutchings, esq., surrogate.

IN THE MATTER OF THE ALLEGED LAST WILL and testament of Charles Fox, deceased.

The petition of the United States of America, by Edwards Pierrepont, esquire, United States district attorney for the southern district of New York, having been duly filed in this court on the twelfth day of February, 1870, representing, among other things, that said petitioner was the sole legatee named in the last will and testament of Charles Fox, late of the county of New York, deceased, and that said deceased was, at or immediately previous to his death, an inhabitant of the county of New York, and departed this life in said county, on the second day of February, 1870, leaving a last will and testament relative to both real and personal estate, and said petitioner praying that said alleged last will and testament might be proved and letters testamentary granted thereon according to law, and satisfactory proof having been made of the due service of the citation heretofore issued in this matter,

requiring the proper parties to appear in this court on the twenty-sixth day of February, 1870, and attend the probate of the said alleged last will and testament of said Charles Fox, deceased.

And said petitioner, the United States of America, having
146 appeared by said Edwards Pierrepont, esq., United States district attorney for the southern district of New York, and by John M. Cooney, esq., as proctor and attorney, and by said Edwards Pierrepont, esq., as counsel, and A. H. Brummell, as one of the persons named as one of the executors in said alleged will, having appeared by Pinckney and Spink, esquires, as his attorneys and proctors, and David Hays, the other person named as an executor in his said alleged will, having appeared by J. Solis Ritterband, esq., as his attorney and proctor in support of the proof of said alleged will, and Benjamin N. Disbrow, the general guardian of Annie Fox, Joseph Fox, and George Fox, minors, and heirs at law, being respectively niece and nephews, children of James Fox, a deceased brother of said Charles Fox, deceased, having appeared in person and by James Flynn, esq., as proctor and attorney of said general guardian in opposition to the probate of said alleged will, and no other parties having appeared herein, and besides other objections to admission to probate under and by virtue of section 11, chapter 359, of the laws of the State of New York, passed April 22d, 1870, the validity of the disposition contained in said alleged will having been contested and their construction and legal effect having been called in question in said proceedings of probate by said general guardian of said nephews and niece, being heirs at law and next of kin of said deceased, to wit, the questions of validity, construction, and legal effect hereinafter determined; and the said matter being duly heard and adjourned from day to day, and the said alleged will and instrument, bearing date the sixteenth day of July, 1864, purporting to be the last will and testament of Charles Fox, deceased, having been produced and the subscribing witnesses to the said instrument having been duly examined touching the facts and circumstances attending the execution thereof, and the competency of the said Charles Fox to execute the

same as and for his last will and testament, and after hear-
147 ing the proof and allegations of the respective parties, and the arguments of the respective counsel in respect thereof, and of the aforesaid questions of validity, construction, and legal effect, and due deliberation being therein had—

It is now adjudged and decreed that the surrogate of the county of New York, by virtue of the power and authority in him vested, doth adjudge and decree:

1st. That the instrument propounded for probate is the last will and testament of said deceased, Charles Fox.

2d. That the said Charles Fox was, at the time of making and publishing the said instrument, of sound and disposing mind and memory and understanding.

3d. That the said instrument was signed, witnessed, and in all respects executed by said Charles Fox as his last will and testament, according to the requirements of the statute in such case made and provided.

4th. That said last will and testament is inoperative and invalid and void as a devise of real estate.

5th. That said petitioner, the United States of America, is not entitled to and cannot lawfully take, receive, or hold as devisee, in trust or otherwise, under said last will and testament, the real estate devised thereby, or any part thereof.

6th. That the real estate of the said Charles Fox, deceased, descends to his heirs at law.

7th. That the said petitioner, the United States of America, is the same artificial person or body politic or corporate described in
148 said last will as the Government of the United States, at Washington, District of Columbia.

8th. That the said last will and testament is valid and operative as to the personal estate of the testator.

9th. That as to the personal estate, the petitioner, the United States of America, is the sole legatee under said will after the payment of all lawful debts.

10th. That no lawful trust as to real or personal estate is created by or vests under said will in the petitioner, the United States of America.

11th. That as to personalty, the bequest in said will to petitioner is not operative as a trust, but as an absolute gift, the terms of said bequest respective to the purpose thereof constituting no legal restriction upon the use of the legacy.

12th. That said instrument is admitted to probate as a will of personal estate only.

All questions of costs, expenses, and allowances in the matter are hereby reserved until the further order of this court.

(Signed) ROBERT C. HUTCHINGS,
Surrogate.

And your petitioner, the said appellant, complains and alleges that so much and such part of said decision, order, judgment, and decree in the words and figures following:

"That said last will and testament is inoperative and invalid and void as a devise of real estate;" and "That said petitioner, the United States of America, is not entitled to and cannot lawfully take, receive or hold as a devise, in trust or otherwise, under said last will and testament, the real estate devised thereby or any part thereof;" "That the real
149 estate of said Charles Fox descends to his heirs at law;" "That said instrument is admissible to probate as a will of personal estate only;"

Together are, and that each and every of them solely and separately is, erroneous, improper, and illegal, and that your petitioner, the said appellant, is injured and aggrieved thereby, and their right, title, and interest of, in, and to the real estate of the said Charles Fox, deceased, is in consequence thereof doubted, impaired, and injured, and they are thereby unjustly deprived of the free enjoyment of the same, and they have in consequence thereof duly appealed to this honorable court for a redress and determination of their rights in the premises.

And the appellant, your petitioner, prays that the several parts of said decision, order, judgment, and decree hereinbefore given, and each and every of them, may be reversed, set aside, and annulled by this honorable court, and that such proceedings may be had, and such issue or issues awarded in the premises, as to the Supreme Court shall seem just and proper for a *a* full and complete determination of the aforesaid rights of your petitioner.

And the appellant, your petitioner, further states that the persons intended to be made defendants, respondents, and parties to the said appeal, and who claim to be interested in the proceedings before the said surrogate, are as follows, to wit: Benjamin N. Disbrow, the general guardian, and Anne Fox, Joseph Fox, and George Fox, minors, and children of James Fox, deceased; David Hays and A. H. Brummell,

the executors named in the last will and testament of Charles Fox, deceased.

And the appellant, your petitioner, prays that the persons named and claiming as aforesaid, and every of them, may answer this petition of appeal, pursuant to law and the rules and practice of this court, and that the Supreme Court may appoint a day and place for the
150 hearing of the parties hereto upon said appeal, and that the appellant, your petitioner, may have such further or other relief in the premises as to the court shall seem just and equitable.

Dated New York, April 13th, 1871.

JOHN M. COONEY,
Attorney for Appellant.
EDWARDS PIERREPONT,
Of Counsel.

STATE OF NEW YORK,
City and County of New York, ss:

On this 13th day of April, 1871, before me personally appeared the above-named John M. Cooney, and made oath that he has read and subscribed the foregoing petition of appeal, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be on his information and belief, and as to those matters he believes it to be true.

JOHN M. COONEY.

Sworn to before me this 13th day of April, 1871.
EDWARD TIMPSON.
Commissioner of Deeds.

151 Supreme court, county of New York.

IN THE MATTER OF THE ALLEGED LAST WILL and testament of Charles Fox, deceased.

THE UNITED STATES OF AMERICA, appellants, *vs.* ANNE FOX, JOSEPH FOX, GEORGE FOX, Benjamin N. Disbrow, David Hays, and A. H. Brummell, respondents.

The above-named respondents, Anne Fox, Joseph Fox, and George Fox, by Benjamin N. Disbrow, their (and each of their) guardian ad litem, for answer to the petition of appeal of The United States of America, appellants, respectfully show—

First. These respondents, by their said guardian ad litem, admit that a decree or order of the date, tenor, and effect in the said petition of appeal set forth, was made by the surrogate of the county of New York.

Second. These respondents, by their said guardian ad litem, say that each and every of those parts of said decree or order complained of by the said appellants as erroneous, improper, and illegal, were and
152 are not erroneous, improper, or illegal, but are in all respects just, lawful, and equitable.

Third. And further answering said petition of appeal, these respondents, by their said guardian ad litem, deny that the United States of America are the sole legatees named in the last will and testament of

Charles Fox, deceased, and deny that said Charles Fox, deceased, made or published a last will and testament to pass real or personal estate.

These respondents, therefore, by their said guardian ad litem, pray that those parts of the said order or decree of the said surrogate of the county of New York, complained of by the said appellants as erroneous, improper, and illegal, may be affirmed, and that said petition of appeal may be dismissed by this honorable court, with costs, and for such other and further relief in the premises as shall be agreeable to law and equity.

JAMES FLYNN,
Atty. for B. N. Disbrow, Guardian ad litem, No. 7 Warren St.

CITY AND COUNTY OF NEW YORK, *ss:*

Benjamin N. Disbrow, being duly sworn, deposes that he is the guardian ad litem of the above-named respondents, Anne Fox, Joseph Fox, and George Fox, minors, duly appointed by the court to defend the appeal herein; that he has read the foregoing answer, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters stated on information and belief, and as to those matters he believes it to be true.

BENJ. N. DISBROW.

Subscribed and sworn to before me this 30th day of November, 1871.
DANL. D. NOYES,
Notary Public, New York City.

153 New York supreme court, city and county of New York.

THE UNITED STATES OF AMERICA, APPELLANTS,
against
ANNIE FOX, JOSEPH FOX, GEORGE FOX, BENJAMIN N. Disbrow, and others, respondents.

Due and timely service admitted of notice of appeal, petition of appeal, and copy of return.

J. SOLIS RITTERBAND,
Atty. for Executors.
PINCKNEY & SPINK,
Attys. for Executors.
JAMES FLYNN,
Atty. for Guardian ad litem.

154 STATE OF NEW YORK,
City and County of New York, Surrogate's Office, ss:

I, Morgan A. Dayton, jr., clerk to the surrogate's court of the county of New York, do hereby certify and return to the supreme court of the State of New York, that the annexed are true and correct copies of each, every, and all proceedings, documents and papers now on file and of record in this office, in the matter of the probate of a paper propounded as the last will and testament of Charles Fox, deceased; that I have carefully compared the same with the originals thereof, now remaining in this office, and find the same to be a correct transcript therefrom, and of the whole of said originals.

In testimony whereof I have hereunto set my hand, and affixed the seal of office of said surrogate, this fifth day of January, in the year of our Lord one thousand eight hundred and seventy-two.

[SEAL.] MORGAN A. DAYTON,
Clerk to the Surrogate's Court.

[U. S. rev. stamp, 5 c.]

155 At a general term of the supreme court, held at the court-house in the city of New York, in and for the first judicial department, on the 14th day of June, A. D. 1872.

Present, Hon. D. P. Ingraham, presiding justice; W. H. Leonard and J. W. Gilbert, associate justices.

IN THE MATTER OF THE PROBATE OF A PAPER-writing propounded as the alleged last will and testament of Charles Fox, deceased.

THE UNITED STATES OF AMERICA, APPELLANTS,
vs.
ANNIE FOX, JOSEPH FOX, GEORGE FOX, BENJAMIN N. Disbrow, David Hays, and A. H. Brummell, respondents.

The appeal by the United States of America from the decree of the surrogate of the county of New York, entered on the 24th day of March, 1871, in the matter of the probate of a paper-writing propounded as the last will and testament of Charles Fox, deceased, coming on to
156 be heard at the general term of the supreme court in and for the first judicial department, and after hearing Edwards Pierrepont, esq., of counsel for said appellant, the United States of America and James Flynn, of counsel for Benjamin N. Disbrow, guardian ad litem of the respondents, Annie Fox, Joseph Fox, and George Fox, it is now, on motion of James Flynn, attorney for Benjamin N. Disbrow, guardian ad litem of said respondents, Annie Fox, Joseph Fox, and George Fox, ordered and adjudged that the said decree of the surrogate of the county of New York, made and entered on the 24th day of March, 1871, mentioned in the appeal of the appellants, and in the petition of the appeal to this court, be, and the same is hereby, affirmed with costs.

(A copy.)

CHAS. E. LOEW, *Clerk.*

Supreme court, general term.

IN THE MATTER OF THE PROBATE OF PAPER-writing propounded as the last will, &c., of Charles Fox, deceased.

INGRAHAM, *P. J.*

Application was made to the surrogate to admit the will of Charles Fox to probate as a will of real estate.

157 The will contains a devise of the residue of the testator's estate, real and personal, to the Government of the United States, at Washington, District of Columbia, for the purpose of assisting to discharge the debt contracted by the war for the subjugation of the rebellious Confederate States.

The heirs at law contested the validity of this disposition of his property. The surrogate admitted the will to probate as a will of personal estate, but refused to admit it as a will of real estate, for the reason that the will was void as a will of real estate, and that the United States could not lawfully take, receive, or hold, as devisee, in trust or otherwise, under the said will, the real estate devised thereby.

From this decision the United States appeal to this court.

Two questions have been argued before us on this appeal:

1st. Whether the United States can take under this will the real estate so devised?

2d. Whether, if they cannot take real estate as devisee, the doctrine of equitable conversion should not be applied so as to require the executors to convert the real estate into personalty, for the purpose of carrying into effect the intentions of the testator?

Although there are other questions which we think might have been argued in this case, we do not purpose, in the disposition of it, to notice any except those which have been argued by the appellant as grounds for reversal of the surrogate's decree.

If this devise is to be considered as a trust in the United States, to apply the property devised for the specified purpose of assisting to pay the debt contracted by the war, it is clear, under the decisions of our courts, that no such trust is valid.

The land being in this State, the validity of the trust is to be decided according to the laws of this State, (Levy *vs.* Levy, 33 N. Y., 97,
158 136;) and, as was decided in that, the trust was not only invalid, but there was no competent trustee to take.

In this case the court below held that the devise to the United States was valid. This was reversed in the court of appeals, and the trust in them was held to be void.

Can the United States take, as devisee of real estate, to their own use? We are of the opinion that neither by the common law, nor under our statues regulating devises, can a devise to the United States be held valid.

That Government is neither a person capable of taking by devise, nor can the statute regulating devises be construed as extending this right to bodies politic or corporate, except when authorized by the laws of this State to take by devise.

This question arose incidentally in Burrill, examiner, vs. Boardman and others, in this court, and the right to take by devise was denied, and in that case, on appeal, (43 N. Y., 263,) the chief-justice expressed his doubts as to the power to take; but the same not being necessary to the decision of that case, no definite opinion was expressed thereon.

By the common law a devise of real estate was not permitted except for a particular use. The right to devise real estate rests in the statute. The statute of this State only allows devises to persons capable of holding, and corporations authorized by their charter to take by devise. As the appellants are not within either of these descriptions, they cannot take under our statutes. The remaining question is whether the doctrine of equitable conversion can be applied to this case so as to make it the duty of the executors to sell the real estate and convert it into personalty for the purpose of carrying out the intent of the testator.

In the case of White vs. Howard, 46 N. Y., 144, referred to in 4 La., 442, Judge Grover says: To constitute an equitable conversion of real into personal, it must be made the duty of, and obligatory upon, the trustees to sell in any event. A mere discretionary power of selling produces no such result.

159 Here there is not even a power of sale, and there is no case where this doctrine has ever been extended so as to give to executors power to sell when such power is not conferred by the will. When the purpose for which a sale is asked for has failed and the necessity ceased, there can be no authority for such conversion.

The doctrine of equitable conversion is based upon the principle that equity will require a thing to be done that ought to be done, but where

it is apparent that the thing sought to be obtained was contrary to law, there is no ground upon which that doctrine can be made applicable.

INGRAHAM, *C. J.*

Concurs—W. H. L.
J. W. G.

Notice of appeal.

Court of appeals, State of New York.

IN THE MATTER OF THE ALLEGED LAST WILL and testament of Charles Fox, deceased, the United States of America, appellant,
against
ANNIE FOX, JOSEPH FOX, GEORGE FOX, Benjamin N. Disbrow, David Hays, and A. H. Brummell, respondents.

Please take notice that the appellant in the above-entitled mat-
160 ter hereby appeals to the court of appeals of the State of New York from the judgment of the supreme court of the State of New York entered on the 29th day of June, 1872, affirming the order or decree of the surrogate of the county of New York, in the above-entitled matter, entered in the surrogate's court on the 24th day of March, 1871.

Dated New York, July 19th, 1872.

JOHN M. COONEY,
Attorney for Appellant, 51 *Chambers Street, N. Y. City.*

STATE OF NEW YORK,
City and County of New York, ss :

I, Charles E. Loew, clerk of the supreme court in and for said county, do hereby certify that the foregoing consists of certified copies of the notice of appeal and judgment-roll on file in my office.

In witness whereof I have hereunto set my hand and affixed my official seal this 28th day of December, A. D. 1872.

CHARLES E. LOEW, *Clerk.*

161 At a special term of the supreme court, held at the court-house in the city of New York on the 3d day of June, 1873.

Present, Hon. E. L. Fancher, justice.

IN THE MATTER OF THE PROBATE OF A PAPER-writing propounded as the last will and testament of Charles Fox, deceased.

THE UNITED STATES OF AMERICA, APPELLANTS,
ag'st
ANNE FOX, JOSEPH FOX, GEORGE FOX, Benjamin N. Disbrow, David Hays, and A. H. Brummell, respondents.

The United States of America having appealed to the court of appeals from the judgment of the general term of this court, entered
162 herein in the office of the clerk of the county of New York, on the

29th day of June, 1872, and said court of appeals having affirmed the judgment of the general term of this court with costs:

Now, on reading and filing the remittitur from the said court of appeals to this court, and on motion of James Flynn, attorney for Benjamin N. Disbrow, guardian ad litem of the above-named respondents, Anne Fox, Joseph Fox, & George Fox:

It is ordered that the judgment of the court of appeals be, and the same is hereby, made the judgment of this court.

Enter:

E. L. F.

163 (Indorsed:) Supreme Court. The United States of America, appel's, vs. Anne Fox, Joseph Fox, and George Fox & o'rs, resp. Order making judgment of court of appeals the judgment of this court. Jas. Flynn, atty. for guardian ad litem, No. 7 Warren st., New York. C. E. L.

164 Supreme court.

IN THE MATTER OF THE PROBATE OF A PAPER-writing, propounded as the last will and testament of Charles Fox, deceased.

THE UNITED STATES OF AMERICA, APPELLANTS, *ag'st* ANNE FOX, JOSEPH FOX, GEORGE FOX, BENJAMIN N. Disbrow, David Hays, and A. H. Brummell, respondents.

The above-named appellants having heretofore appealed to this court from the decree of the surrogate of the county of New York, made and entered on the 24th day of March, 1871, in the matter of the probate of a paper-writing propounded as the last will and testament of Joseph Fox, deceased, and the respondents, Anne Fox, Joseph Fox, and George Fox, by Benjamin N. Disbrow, their guardian ad litem, having filed their answer to the petition of appeal, and the said appeal having been
165 heard at the general term of this court, held in June, 1872, and the discision of said general term having been duly rendered at said term, as appears by the order of said court, bearing date June 14 1872, and duly filed with the clerk of this court, whereby it appears that the said decree of the said surrogate of the county of New York was affirmed with costs:

Now, on motion of James Flynn, attorney for Benjamin N. Disbrow, guardian ad litem of the respondents Anne Fox and James Fox:

It is adjudged that the said decree of the said surrogate of the county of New York, made and entered on the 24th day of March, 1871, in the matter of the probate of a paper-writing propounded as the last will and testament of Charles Fox, deceased, be, and the same is hereby, affirmed, & that Benjamin N. Disbrow, guardian ad litem of the respondents Anne Fox, Joseph Fox, and George Fox, recover of the United States of America, appellants, the sum of one hundred & six $\frac{55}{100}$ dollars, his costs and disbursements on said appeal.

166 Filed June 29, 1872, 11 o'clock & 59 min's.

Judgment.—June 11, 1873.

Supreme court.

IN THE MATTER OF THE PROBATE OF A PAPER-writing, propounded as the last will and testament of Charles Fox, deceased.

THE UNITED STATES OF AMERICA, APPELLANTS, *ag'st* ANNE FOX, JOSEPH FOX, GEORGE FOX, BENJAMIN *Fox* N. Disbrow, David Hays, and A. H. Brummell, respondents.

The United States of America having taken an appeal in this action from the judgment of the general term of the first judicial department, entered herein on the 29th day of June, 1872, to the court of appeals, having been argued, and the said judgment having been affirmed with costs, and the remittitur from said court of appeals having been filed and an order duly entered, making the judgment of the court
167 of appeals the judgment of this court:

Now, on motion of James Flynn, attorney for the guardian ad litem of the respondents Anne Fox, Joseph Fox, and George Fox, minors:

It is ordered and adjudged that Benjamin N. Disbrow, as guardian ad litem of said minor respondents, recover of the United States of America, appellants, the sum of one hundred and forty-seven $\frac{08}{100}$ dollars, costs and disbursements upon appeal to said court of appeals, together with the sum of four thousand dollars awarded to said guardian ad litem by order of this court as an additional allowance to the usual costs, making together the sum of four thousand one hundred and forty-seven $\frac{08}{106}$ dollars, costs and disbursements, and that said guardian ad litem have execution therefor.

(Endorsed:) Filed June 11, 1873, 12 o'clock 2 min.

168 Court of appeals.

IN RE WILL OF CHARLES FOX, DEC'D.

ANDREWS, *J.*:

The right of the United States to acquire and hold lands within this State is incident to the execution of certain powers conferred upon Congress by the Constitution; has been exercised from the foundation of the Government. It has been sanctioned by practice, and it has not been questioned or denied.

It is essential that this right should inhere in the General Government.

The Constitution, among other powers, vests in Congress the power to regulate commerce, declare war, to levy and collect taxes, to establish post-offices, and to constitute inferior courts.

In executing these powers it may take and hold land for the erection of light-houses, forts, custom-houses, post-offices, and court-houses, and the State has been ready at all times to promote the interests
169 of the General Government, by assenting to the exercise by the latter of exclusive power of legislation over lands in this State, acquired for these purposes.

The mode in which Congress shall acquire the lands within a State required for public uses is not prescribed by the Constitution.

It may acquire title, doubtless, by voluntary conveyance of the owner, in any manner authorized by the law of the State in which the lands required are situated, or it may take them by the exertion of the power of eminent domain, upon making compensation to the owner. (Reddale vs. Bryan, 14 Md., 444; Story on Const., § 114; Cooley on Const. Law, 55.) But it does not follow from the concession that Congress may take lands within a State for necessary public uses, that the United States has power, under the Constitution, to take lands by devise. It was held by this court, in Ley vs. Levy, 33 N. Y., 99, that it had no power to take lands by devise in trust for a charity.

It is not necessary in this case to decide whether the United States could, with the consent of a State, accept a devise of lands made
170 to it directly and unaccompanied by any trust.

In view of the origin and nature of the power to devise lands, of the right of each sovereignty to determine the limitations under which this power shall be exercised, and of our statute upon the subject, the devise to the United States in the will in question cannot be sustained.

Statutes of wills are enabling acts. Prior to the statutes 32 Henry 8, c. 1, & 35 Henry 8, c. 8, there was in general no power at common law to devise lands. It was a part of the feudal policy that land could not be alienated without the consent of *of* the lord, and the power to devise lands was opposed to this policy. If permitted it would have deprived the lord of many *of many* of the incidents and profits of feudal tenure.

The statutes referred to were not restrictive of antecedent rights, but conferred a limited power to devise. They permitted all persons except feme coverts, infants, idiots, and persons of non-sane memory, having a sole estate in fee simple, *if* any manors, &c., to give, dispose, will, or devise to any person or persons, except bodies politic or corporate.

The English statute of wills became a part of the law of this State upon the adoption of the constitution of 1777. It was substantially re-enacted by statute passed in 1787 & in 1783; (1 Green Laws,
171 387; 1 R. S., 364;) and at the revision in 1850, the language was changed so as to provide that a testator may devise his lands to any person capable by law of holding real estate; but no devise to a corporation shall be valid unless such corporation be especially authorized by its charter or statute to take by devise. (2 Rev., 57, § 3.)

The validity of the devise to the United States in the will in question is to be tested by this statute. It is a settled principle of the common law, that the lex rei sitæ in respect to the modes of transfer of real property and the capacity to make and receive them and the validity of devises of land, is regulated and controlled by the local law, and the law of any other jurisdiction or sovereignty upon the subject in opposition to the law of the place is nugatory.

There can be no pretense that the States have surrendered to the General Government the control of this subject.

No such claim has been asserted, and jurisdiction over testamentary dispositions of land within a State by the General Government is in no way an essential or appropriate incident to the power to take lands for public uses.

172 The statute of wills authorize devises to be made to any person capable by law of holding real estate, and to such corporations as are especially authorized by their charters, or by statute, to take by devise.

It was held in White vs. Howard, 46 N. Y., 144, that corporations referred to in this statute are corporations created by and existing under the law of this State, and a devise to a foreign corporation of lands here was held to be void, although the corporation was authorized by its charter to take by devise.

It must be maintained, therefore, to sustain the devise in question, that the United States is a person, within the purview of the statute.

That the word person was not intended to designate natural persons only is evident from the prohibition as to devises to corporations, which is in the nature of an exception to the general power to devise to every person, given in the previous clause of the sentence.

This still more distinctly appeared in the former statute, which allowed a devise to be made to any person or persons, except bodies politic or corporate.

Corporations will, in general, be deemed included in legal enactments extending generally to persons. (Shaw J, in Cumings vs. Phœnix
173 Bank, 11 Met., 129; School Directors vs. Carlisle Bank, 8 Watts, 289; United States vs. Amesley, 11 Wheat., 393; Angell & Ayres on Corps., § 17.) They are artifical persons, bodies politic, possessing some of the attributes of natural persons, and deriving their existence and powers from the State, and are subject to many of the obligations and duties imposed by the law upon individuals. But no authority has been referred to, showing that the word person, when used in a statute, may, without further definition, be held to embrace a State or nation. Its meaning may be extended by express definition, so as to include a government or sovereignty.

An example of it may be found in our statute relating to crime, (2 Rev. St., 703, § 35,) which declares that when the word person is used in the chapter to designate the party whose property may be the subject of an offense, it shall be construed to include the United States, or any State government or county which may lawfully own any property within this State.

In construing a statute words are to be taken in their ordinary sense, unless from a consideration of the whole act it appears that a different meaning was intended.

The word person does not, in its ordinary or legal significance,
174 embrace a State or government, and there is no ground to justify such an extension of its meaning in construing the statutes relating to devises.

The gift in the will in question to the United States cannot be sustained as a devise of land, for the reason that the testamentary capacity given by the statute extends only to natural persons and such corporations as are authorized by the law of the State to take by devise.

The point urged by the United States, that there was by the will an equitable conversion of the land into personalty, and that the gift may be treated as a bequest of the proceeds which should arise from the sale of the lands, cannot be sustained. There was no constructive conversion of the realty.

The plain intention of the testator was to devise the lands as such, and that the United States should take it as a devise.

He used apt words to charge the lands devised with the payment of debts. The devise being after the payment of debts, was a charge of the debts upon the lands devised. Lupton vs. Lupton, 2 V. C. C., 614.

The lands were not charged in exoneration of the personalty;
175 and under our statute the lands devised would have been charged

in the hands of the devisees with the debts to the same extent, if no reference had been made to them in the will.

The only contingency in which a sale of the lands could become necessary for the purposes of the will would be in case the personal property should be insufficient to pay the debts of the testator.

It was wholly uncertain whether a sale for that purpose would be required. There was no direction in the will that the lands should be sold for the payment of the debts. No express power was given to the executors to sell them, nor under our system of administering the property of decedent for the payment of creditors can such a power be implied from the mere charge of debts upon lands descended or devised. In Jones vs. Hughes, 6 Exchr., 222, it was held by the unanimous judgment of the court of excheq'r chamber that there is no implied power in executors to sell lands which descend to heirs charged with the payment of debts; that the remedy of creditors was in equity. This decision was not followed by the master of the rolls in Robinson vs. Lambert, 17 Bea., 592, or by the lord justice in the same case on appeal, 5 DeG. & M. & G., 27.

Lord St. Leonards (Sug. on Vendors, 14 Eng. Ex.) speaks of
176 these latter decisions as contrary to the received opinions; and the law upon the point has since been settled by statute 22 & 23 Vict., C. 35.

The statute in this State has provided an ample remedy for creditors against the real estate of a deceased person, for the collection of their debts and the implication of a power of sale in executors from a simple charge of the debts upon the lands is unnecessary and ought not to be indulged.

But it is unnecessary to decide the question, as the mere power of sale, if it existed in the executor, would not work a constructive change of the property.

The duty to sell must be imperative; and where there is no out and out conversion, and lands are charged only with the payment of debt, they retain their character of realty until they are actually converted. 2 Law, 529; Story Eq., § 790, 1224; Bourne vs. Bourne, 2 Hall, 35; Stagg vs. Jackson, 1 Comstock, 206; Harris vs. Clark, 7 Wes., 206; Savage vs. Burnham, 17 N. Y., 561; Clark vs. Ridelle, 11 S. & R., 311.

The judgment of the gen'l term should be affirmed.

ANDREWS, *J.*

All agree.

(Indorsed:) N. Y. court of appeals. In re: Will of Charles Fox. Opinion.

(Indorsement on cover:) No. 565. The United States, plaintiff in error, vs. Annie Fox, Joseph Fox, George Fox, Benjamin N. Disbrow, David Hays, A. H. Brummel. New York c't of appeals. Filed 8th October, 1874.

Evening Post Steam Presses, 41 Nassau Street, cor. Liberty.

Supreme Court of the United States.

The United States,
Plaintiffs in Error,

vs.

Annie Fox and others,
Defendants in Error.

STATEMENT OF FACTS.

On the 16th day of July, 1864, Charles Fox, of the city of New York, made his last will and testament (fols. 17, 18), whereby he devised, or which purported to give or devise, to the Government of the United States, at Washington, certain real estate, situated in the city of New York and elsewhere, for the purpose of assisting to discharge the debt contracted by the war, and thereafter on the 2d day of February, 1870, the said testator died (fol. 16). The United States District Attorney for the ~~Northern~~ District of New York then applied by petition to the surrogate of the city and county of New York to admit the said will to probate (fol. 16).

The infant heirs of said Fox contested the will (fols. 21, 23).

The surrogate decided that the will was "inopera-"tive, invalid and void as a devise of real estate," and that the United States was not entitled to and could not lawfully "take, receive or hold, as devisee "in trust, or otherwise, under said last will and testa-"ment, the real estate devised thereby or any part "thereof." He also held and decided that the will was good as a will of personal estate, and that the United States was sole legatee, and could take the personal estate as such (fol. 138).

The United States appealed from that decision to the Supreme Court (fols. 139, 140, 142), where the said decree was affirmed (fols. 155, 156). The United States then appealed to the Court of Appeals of the State of New York (fols. 159, 160), where the judgment appealed from was affirmed (fols. 12, 13, 14), and the record was thereupon remitted to the Supreme Court to be enforced as the judgment of that court (fol. 14), and by order of the Supreme Court judgment was then entered in accordance with the decision of the Court of Appeals (fols. 161, 162, 163, 164, 165, 166, 167).

A writ of error to remove the cause to the Supreme Court of the United States for review was then applied for and granted on the grounds (fols. 1, 2, 3):

1. That there "was drawn in question the validity "of an authority exercised under the United States."

2. That there "was drawn in question the validity "of a statute of the State of New York as against the "United States, on the ground of its being repugnant "to the Constitution of the United States, and the de-"cision was in favor of its validity."

3. That there was "drawn in question the construc-"tion of the Constitution of the United States in res-"pect to its authorizing the said United States to take

"real estate devised to it, and the decision was against "the title to said real estate set up and claimed under "said Constitution."

And now the heirs of said testator, the defendants in error, apply to dismiss the appeal or writ or error, for want of jurisdiction, claiming that no such matters or rights were drawn in question, and that neither section 25 of the Judiciary Act, nor the Act of February 5, 1867, give to the plaintiff in error the right to have the judgment in this case taken to the Supreme Court of the United States for review.

POINTS.

I.

"The validity of an authority exercised under the "United States," was not drawn in question by the record or proceedings in that cause or proceeding.

As the plaintiff in error defines or explains it, he claims that the authority of the secretary of the treasury or other proper officer of the United States, to receive on behalf of the United States, the property real and personal, bequeathed and devised, was questioned, and that the decision was against the validity of such authority.

It does not appear from the record nor from any proceeding in the cause, that any such question was before the court, or that the court decided any such thing.

No authority had been or was being exercised under the United States, or by any officer of the United States. Nothing done by any such officer was held invalid.

The devise was of land situated in the State of New

York, and the will was made by a citizen of that State, in pursuance of the *statutes of that State*, and the court simply held that the United States of America was not entitled to and could not lawfully take the real property under *that will*, made in pursuance of the New York statutes, which did not authorize such a disposition by will or devise of real property within its limits.

The acts done were done by the testator and the surrogate, and the only authority exercised was so exercised under the statutes of the State of New York.

There are many cases where the validity of acts done by officers, agents or employes of the general government are drawn in question in State courts, and the words in the Judiciary Act and the Act of 1867. "*Authority exercised under the United States*" has reference to such cases; but it would be a forced and extraordinary construction of the act to hold it to extend to a case where no authority has been exercised under the United States, where no act done by any officer, agent or other person, has been done under the direction of, or in pursuance of any law of the United States, and where no such act or proceeding has been held invalid.

The act of Congress does not purport to nor was it ever intended to apply to any such case.

This court has uniformly held that to entitle a party defeated in a State court to bring his case to this court for review, by writ of error, the case must be brought *clearly* and indisputably within the provisions of the Act of Congress.

Ocean Ins. Co. *vs.* Polleys, 13 Peters, 157, 164.

Commercial Bank of Cincinnati, *vs.* Buckingham's Exrs., 5 How., 317, 341, 342.

See also other cases cited in the following 3d Point.)

Even if the question had been raised, and the court

had held that the secretary of the treasury, or other officer of the United States, could not or had not authority to receive the property devised by that will, that would not have been drawing in question the validity of an authority exercised under the United States, for these among other reasons:

1. No authority has or had been exercised. The statute does not provide for the case of an act not yet done, and which may never be done, or for the case of a decision that an authority cannot be lawfully exercised, which has never been, and may never be exercised or attempted.

2. The question could not arise in this case in any form. The secretary of the treasury and other officers are but agents of the government. They are not the government. Their authory to receive and hold property belonging to the government, or to do any other act for the government, is simply their commission or power of attorney, and a question of the sufficiency of that cannot, or at least has not, in any form, come in question in this case. The question is a question of *title* of their principal, and not of the sufficiency of the power or authority given to them to act for their principal.

   When the question of title is established in their principal, and these officers or agents in the exercise of the power conferred on them, deal with or dispose of the property, or bring actions to recover it, a question as to the validity of an authority exercised by them, may be brought in question, but not before.

   It cannot be necessary to consider this question further. The writ cannot be sustained, because of this assignment or ground of error.

II.

Neither is the second ground or assignment of error warranted by any facts in the case.

There was not drawn in question the *validity* of any statute of the State of New York, nor was any statute of the State held or claimed to be repugnant to the Constitution of the United States. The United States did not claim the property under or because it was given by the Constitution of the United States, nor was the will or devise based upon, authorized or regulated by the Constitution of the United States.

The right to dispose of land by will or devise, and the validity of the devise are regulated and governed solely by State laws.

White *vs.* Howard, 46 N. Y., 144.
Levy *vs.* Levy, 33 N. Y., 136.
United States *vs.* Crosby, 7 Cranch., 115.
McCormick *vs.* Sullivant, 10 Wheaton, 71.

A statute of the State of New York authorized the disposition of real property within the State, under certain restrictions, and the only right the testator in this case had to dispose of his property by will or devise was given by that statute, as by the common law he had no such rights (see the opinion in this case at fols. 158, 170).

The testator in thus attempting to dispose of his property devised it to the "United States of America," in trust, and the question arising on that will was not whether the statute was *valid* or not, but whether the statute authorized such a disposition of his property or whether it authorized him to make such a will. It was a question, as to the meaning and effect of the statute, purely a question of *construction*.

Commercial Bank of Cincinnati *vs.* Buckingham's Exrs., 5 How., 317, 341, 342.

The United States did not claim that the statute was

invalid, but only that the statute *as it reads* authorized the testator to devise his land to the United States and to make the United States a trustee for its own creditors. The United States was the petitioner offering the will for probate, and was not in a situation to question the validity of the statute, as questioning that would be questioning the validity of the will itself. Suppose on the appeal the United States had claimed and the court had held that the statute was void, the will would have fallen with it. It will thus be seen that the statute was not claimed on the part of the United States to be invalid, and if the validity of the statute had been in question and had been held valid it would not have been a decision against the United States, but on that question would have been in its favor.

Again, it is claimed by the plaintiff in error that the validity of the statute was in question and held valid against the right of United States, but that it was held valid on the ground that it was *repugnant* to the Constitution.

To be *repugnant* to the Constitution it must be *contrary to* or *opposed to* the Constitution. It must deny to the United States a right which the Constitution gives, and which the United States could exercise, if the statute was not in existence.

Does the United States Constitution provide for the disposition of land in the several States by will or devise?

Are not those State rights governed by and depending on State laws?

Does the Constitution restrict the right of a State to provide for and regulate the disposition of property, within its limits, by will or devise? The law on this subject is too well settled and too well known to leave it a debatable question.

There is nothing in the Constitution on the subject, and nothing there for that statute to be repugnant to. It might as well be claimed that a statute of any foreign country, regulating the disposition of its real

estate, by will or devise, is repugnant to the Constitution of the United States. There was never such a question in this case.

In the assignment of errors (fol. 8), it is claimed or alleged, *not that the statute is invalid*, but that as *construed by the courts*, it was drawn in question, and that the decision was in favor of its validity *as construed*.

Can there be a more complete *felo de se* than this?

Is there not here an admission that it was a question of the *construction* or *meaning* of a statute, and not a question of its validity?

And, that being so (assuming that there was even a question of construction before the court), the writ must be dismissed for want of jurisdiction, as was done in the case of the Commercial Bank of Cincinatti *vs.* Buckingham's executors, before cited, 5 How., 241, 242.

III.

The other ground or assignment of error has still to support it. It is there alleged that the construction of the Constitution was drawn in question, in respect to its authorizing the United States to take real estate devised to it.

What clause of the Constitution was drawn in question? The plaintiff in error does not point out any, nor does the record show any.

The Act of 1867, which, it is supposed, was intended to supersede the provisions of sec. 25 of the Judiciary Act, does not provide for assigning such a ground of error. But, assuming the provisions of sec. 25 of the Judiciary Act to be still in force, there are these reasons why that ground of error is not good, or sufficient to give this court jurisdiction to review the judgment in this cause by writ of error.

1. The writ and assignment of error should show what clause of the Constitution has been construed or drawn in question, or at least the *record* should.

Gibson *vs.* Chauteau, 8 Wallace, 314.
Railroad Co. *vs.* Rock, 4 Wallace, 177.
Suydam *vs.* Williamson, 20 How., 427.
Christ's Church *vs.* Co. of Philadelphia, 20 How., 26.
Taylor *vs.* Morton, 2 Black, 481.
Bridge Proprietors *vs.* Hoboken Co., 1 Wallace, 116.

It is not sufficient even that such a question might have been raised, or even that such a question was argued, but the *record must show* that the question was in fact *raised* and *necessarily* decided.

The Ocean Ins. Co. *vs.* William Polleys, 13 Peters, 157.
Crawford *vs.* Branch Bank of Mobile, 7 How., 279.
Mills *et al. vs.* Brown *et al.*, 16 Peters, 525.
Commercial Bank of Cincinnati *vs.* Buckingham, 5 How., 341.

How or where does it appear in the record in this case that any clause of the Constitution was in question or construed?

It is said in the assignment of errors that the construction of the Constitution was drawn in question "in respect to its authorizing the said United "States to take real estate devised to them" (fol. 8).

An examination of the record will show not only that the construction of the Constitution was not thus drawn in question, but that no such question was decided.

The decision of the surrogate (fol. 138), which

was affirmed, was, that the United States could not take the real estate devised by *that will*, and that as a devise of real estate *that will* was void. It was not decided that the United States could not take real estate devised to them, or that the United States could not be a devisee, but simply that the statutes of the State of New York did not authorize a devise of land situated in that State to the United States of America, or, as expressed in the will, "to the Government of the United States "at Washington." That is what the surrogate decided, and all that the record shows.

Looking further at the opinions of the courts on appeal, which however are no part of the record (51 N. Y. Rep., 355; 36 N. Y. Rep. 316; 13 Peters, 164, 165), it will be seen that both the appellate courts were of the opinion that, under the common law, or under the New York Statutes, the United States could not, as devisee, take the land, not that the Constitution of the United States did, or did not, authorize it.

Justice Andrews, in delivering the opinion of the Court of Appeals in the case (fols. 169, 170), says: "It is not necessary in this case to decide "whether the United States could, with the con- "sent of a State, accept a devise of lands made to "it directly and unaccompanied by any trust. In "view of the origin and nature of the power to "devise lands, of the right of each sovereignty to "determine the limitations under which this "power shall be exercised, and of any statute "upon the subject, the devise to the United "States in the will in question cannot be sus- "tained."

See also 52 N. Y., 533.

It must be apparent, without further argument, that there was *not* "drawn in question the construction of the Constitution of the United

States," and that the jurisdiction of this court cannot be invoked or retained because of that or any such question in this case.

Nor is it true, as averred or set forth in the writ of error, that "the decision was against the "title to said real estate, set up and claimed *under* "*the Constitution.*" No title was set up or claimed under the *Constitution.* The title was set up and claimed under the *Statutes of the State of New York* and the will.

But this has been sufficiently stated and argued in this and the preceding points.

There is no ground on which this writ of error can be sustained, and it should be dismissed.

JAMES FLYNN,
Attorney and Counsel for Defendants in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1874.

THE UNITED STATES, PLAINTIFFS IN ERROR,
vs.
ANNIE FOX AND OTHERS, HEIRS-AT-LAW OF CHARLES FOX, DEFENDANTS IN ERROR. } No. 565.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

Brief submitted by the United States in opposition to the motion to dismiss the case for want of jurisdiction.

In the Supreme Court of the United States.

OCTOBER TERM, 1874.

THE UNITED STATES, plaintiffs in error,
vs.
ANNIE FOX AND OTHERS, heirs at law of Charles Fox, defendants in error.

No. 565.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

Brief submitted by the United States in opposition to the motion to dismiss the case for want of jurisdiction.

STATEMENT.

Charles Fox, of the city of New York, by his will, dated the 16th of July, 1864, devised and bequeathed (after payment of debts) all the residue of his property, real and personal, (including sundry parcels of land situated in the State of New York,) "*to the Government of the United States at Washington, District of Columbia, for the purpose of assisting to discharge the debt contracted by the war for the subjugation of the rebellious Confederate States.*" (Rec., pp. 5, 6.)

The surrogate for the county of New York, upon the will being propounded for probate, decreed:

"That the said last will and testament is inoperative and invalid and void as a devise of real estate.

"That said petitioner, the United States of America, is not entitled to and cannot lawfully take, receive, or hold as devisee, in trust or otherwise, under said will and testament, the real estate devised thereby or any part thereof.

"That the real estate of the said Charles Fox, deceased, descends to his heirs at law.

"That the said petitioner, the United States of America, is the same artificial person or body politic or corporate described in said last will and testament as the Government of the United States, at Washington, District of Columbia.

"That the said last will and testament is valid and operative as to the personal estate of the testator.

"That as to the personal estate, the petitioner, the United States of America, is the sole legatee under said will, after the payment of all lawful debts.

"That no lawful trust as to real or personal estate is created by or vests under said will in the petitioner, the United States of America.

"That as to personalty, the bequest in said will to petitioner is not operative as a trust, but as an absolute gift, the terms of said bequest respective to the purpose thereof constituting no legal restriction upon the use of the legacy.

"That said instrument is admitted to probate as a will of personal estate only." (Rec., p. 73.)

From this decree the United States appealed to the supreme court of the State, which affirmed the same,

(Rec., p. 81. *In re* will of Fox, 63 Barb., 158,) and from thence to the court of appeals, which again affirmed the decree, (Rec., p. 85. *In re* will of Fox, 52 N. Y., 530.) The opinions of the supreme court and court of appeals are printed in the record, pp. 81, 85.

The United States thereupon sued out a writ of error to this court, which the defendants in error move to dismiss.

ARGUMENT.

"A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, * * * * * * * where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court on writ of error." Rev. Sts., § 709, p. 132; 1 Sts. at Large, 85; 14 Ibid., 386.

The question now before the court is, whether it has jurisdiction to re-examine this case. The writ of error cannot be dismissed, because the court may have a very clear conviction that the decision below was correct.

Pennywit *v.* Eaton, 15 Wall., 380.

It is submitted that among the prerogative powers enjoyed by the United States Government, under the Constitution, as necessarily inherent in its sovereign character and essential to the proper exercise of its sovereign functions, is that of acquiring property for public purposes in every part of the country, by all the usual

methods known to the law; and that this power extends to real property as well as to personal, and to taking by devise as well as by ordinary conveyance. Indeed, it is difficult to see any distinction in respect of this between real and personal property and between devises and conveyances. If a State can forbid the Government from taking real estate by devise, it may forbid its taking by grant.

The case is analogous to those where the inherent right of the General Government has been discussed and sustained to take bonds and other securities known to the law, and to enforce the same, though it has not been authorized to do so by any act of Congress.

Dugan *vs.* United States, 3 Wheat., 172.
United States *vs.* Tingey, 5 Pet., 127, 128.
United States *vs.* Bradley, 10 Pet., 359, 360.
United States *vs.* Linn, 15 Pet., 316, 317.
United States *vs.* Hodson, 10 Wall., 407.

It is contended on the other side that no question respecting the powers of the General Government was involved in this case or raised by the record, but that it only involved the validity of Fox's will under the laws of New York. The surrogate, whose decree was affirmed, decreed that the instrument propounded was the last will and testament of Fox, and, in respect of the personal estate, he admitted it to probate as such, but decreed that it was inoperative and void as to the real estate, because the United States "is not entitled to and cannot lawfully take, receive, or hold as devisee in trust or otherwise, under said last will and testament, the real estate devised thereby or any part thereof." (Rec., p. 73.) And the record, as well as the decisions in the New

York courts, show that the reason for holding that the United States could not take the real property under this will was that they were not within, that is, were excluded from the New York statute of devises, broad as its language is.

Nor is the jurisdiction of this court ousted because the case involves questions of the local law of New York or the construction of the statute of wills of that State. This was early decided in the case of Smith *vs.* Maryland, 6 Cranch, 286, where the court held that the construction of the treaty of peace with Great Britain was drawn in question when the inquiry was whether, under the laws of a State, such a title existed as the treaty protected, although the only difficulty of that inquiry consisted in the interpretation of the State laws and their application to the case.

This principle is well illustrated by the history of the great Fairfax case. There, in deciding whether the title of Lord Fairfax's devisee was protected by the treaty of 1794, the court decided that, under the statute of devises of Virginia, an alien might take lands and hold them until office found; that certain proceedings in Virginia did not take the place of an inquest of office or vest the land in the Commonwealth; and having thus established the character of the title under the laws of Virginia, it held that it was an estate protected by the treaty.

Hunter's Lessee *vs.* Fairfax, 1 Munf., 218; S. C., *nom.*, Fairfax *vs.* Hunter, 7 Cranch, 603; S. C., *nom.*, Martin *vs.* Hunter, 1 Wheat., 304.

In delivering the judgment of this court in 1 Wheat., at p. 357, Mr. Justice Story says: "The objection urged at the bar is that this court cannot inquire into the

title, but simply into the correctness of the construction put upon the treaty by the court of appeals, and that their judgment is not re-examinable here, unless it appears on the face of the record that some construction was put upon the treaty. If, therefore, that court might have decided the case upon the invalidity of the title, (and *non constat* that they did not,) independent of the treaty, there is an end of the appellate jurisdiction of this court. * * * * If this be the true construction of the section, it will be wholly inadequate for the purposes which it professes to have in view, and may be evaded at pleasure. But we see no reason for adopting this narrow construction; and there are the strongest reasons against it, founded upon the words as well as the intent of the legislature. What is the case for which the body of the section provides a remedy by writ of error? The answer must be, in the words of the section, a suit where is drawn in question the construction of a treaty, and the decision is against the title set up by the party. It is, therefore, the decision against the title set up with reference to the treaty and not the mere abstract construction of the treaty itself upon which the statute intends to found the appellate jurisdiction. How, indeed, can it be possible to decide whether a title be within the protection of a treaty until it is ascertained what that title is, and whether it has a legal validity?"

Nor does this court treat the construction put by the State courts upon their constitution and laws as conclusive, when the question involved is whether these conflict with the Federal Constitution. This is fully shown by cases brought to this court from State courts under the 25th section of the original judiciary act, on the

ground that the State had passed a law impairing the obligation of a contract. In Ohio Life Ins. and Trust Co. *vs.* Debolt, 16 How., 432, 433, Chief Justice Taney says: "It has been contended in behalf of the defendant in error, that the construction given to these acts of assembly by the State courts ought to be regarded as conclusive. It is said that they are laws of the State, and that this court always follows the construction given by the State courts to their own constitution and laws. But this rule of interpretation is confined to ordinary acts of legislation, and does not extend to the contracts of the State, although they should be in the form of a law; for it would be impossible for this court to exercise any appellate power in a case of this kind, unless it was at liberty to interpret for itself the instrument relied on as the contract between the parties."

In the application of this principle in the recent case of Gelpcke *vs.* Dubuque, 1 Wall., 216, Mr. Justice Miller, who dissented from the rest of the court, fully admitted the principle itself, and said: "It was urged that the very judgments of the supreme court of Ohio, which were then under review, [in Ohio Life Ins. and Trust Co. *vs.* Debolt, *supra*,] being the construction placed by the courts of that State on their own statutes and constitution, should be held to govern the Supreme Court of the Union, in the exercise of its acknowledged right of revising the decision of the State court in that class of cases. It requires but a bare statement of the proposition to show that, if admitted, the jurisdiction of the Federal Supreme Court to sit as a revisory tribunal over the State courts, in cases where the State law is supposed to impair the obligation of a contract, would be the merest sham."

The power to devise lands was fully established before the Constitution was adopted, and indeed before this country was colonized, and was then universally adopted here. (See 4 Kent Com., 504, 505.) It is immaterial that it owes its existence to the Statutes of Wills, enacted in the reign of Henry the Eighth. It was as universally recognized a mode of acquiring land as a grant from a living person was. Both are parts of the local law of the several States. And as was said before, if the courts of the several States can defeat a devise to the United States by deciding that the United States are not within their Statute of Wills, they can further rule that, under the laws of the State, the United States cannot take by conveyance or hold lands without permission of the State Government. An examination of the statutes of New York shows this. The Revised Statutes of that State, part 2, chap. 1, tit. 1, § 8, enacts that "every citizen of the United States is capable of holding lands within this State, and of taking the same by descent, devise, or purchase." Chap. 6, tit. 1, § 2, providing for wills of real estate, enacts that "every estate and interest in real estate descendible to heirs, may be so devised." Then § 3 enacts that "such devise may be made to every person capable by law of holding real estate; but no devise to a corporation shall be valid, unless such corporation be expressly authorized by its charter or by statute to take by devise."

2 Rev. Sts. of New York, (4th ed.,) 126, 241.

Mr. Justice Andrews, in delivering the judgment of the Court of Appeals in this case, says, very truly, that the word "person" is broad enough to include corporations; "otherwise, the prohibition against devises to

corporations, not authorized by their charters or by statute to take by devise, would have been unnece ssary."

In re Will of Fox, 52 N. Y., 535.

As a rule all persons can take by devise who can take by grant.

Com. Dig. Devise, I.

Perk., § 505.

Vidal *v.* Girard, 2 How., 186, 187.

It has been held in New York, however, that a foreign corporation cannot take by devise under this statute.

White *vs.* Howard, 46 N. Y., 144.

And it would seem to follow that, as every person capable of holding lands can take by devise, since the United States cannot take by devise, they cannot hold lands within the State without the permission of the State government.

Whether a foreign government or foreign corporation shall take and hold lands within a State, is undoubtedly a matter of comity and not of right. But in New York the United States is neither a foreign government nor a foreign corporation. They are the sovereign within the State for all the purposes for which the Federal Government was established, as much as the State government is for its purposes, and as such sovereign, possess the essential sovereign attributes and prerogatives, and can exercise these as well within the limits of a State as in the District of Columbia. "The United States," says Mr. Justice Bradley, "is not only a Government, but it is a National Government, and the only government in this country that has the character of nationality. * * * * Such being the character of the General Govern-

ment, it seems to be a self-evident proposition that it is invested with all those inherent and implied powers which at the time of adopting the Constitution were generally considered to belong to every government as such, and as being essential to the exercise of its functions."

Legal Tender cases, 12 Wall., 555, 556.

See, also, Cotton *v.* United States, 11 How., 231.

Certainly among the powers which, at the time of the adoption of the Constitution, were considered as inherent in a sovereign, was that of taking and holding, by all usual methods, lands and personal property, within his own territory, for the purposes of government. It never seems to have been doubted that the King could take by devise. Would a devise of land to him for a custom-house, a soldiers' or seamen's hospital, or a similar purpose, have been held void in 1776? If so, it would have been solely by operation of the statutes of mortmain, which can hardly bind him, and which never extended to the colonies.

Perin *vs.* Carey, 24 How., 465.

Whicker *vs.* Hume, 7 H. L. Cas., 124.

In a recent case, Mr. Justice Strong thus broadly states the doctrine as to the inherent prerogative rights of the Federal Government: "It is a familiar principle that the King is not bound by any act of Parliament unless he be named therein by special and particular words. The most general words that can be devised, (for example, any person or persons, bodies politic or corporate,) affect not him in the least, if they may tend to restrain or diminish any of his rights and interests. He may even take the benefit of any particular act, though not

named. The rule thus settled respecting the British Crown is equally applicable to this Government, and it has been applied frequently in the different States, and practically in the Federal courts. It may be considered as settled that so much of the royal prerogatives as belonged to the King in his capacity of *parens patriæ*, or universal trustee, enters as much into our political state as it does into the principles of the British constitution."

Savings Bank *vs.* United States, 19 Wall., 239.

The doctrine as to statutes, above referred to, with its limitations, is well stated in Chitty on Prerogative, 382–384, and is recognized and established in New York in favor of the State.

People *vs.* Gilbert, 18 Johns., 227.

People *vs.* Rosseter, 4 Cow., 143.

It applies as well to the statutes of the several States as to those of the United States.

United States *vs.* Hoar, 2 Mason, 311.

The counsel for the Government submit that under the principle laid down in Savings Bank *vs.* United States, the United States, even if not named in the Statute of Wills of New York, can take advantage of it and receive a devise of land.

The cases cited by the counsel for the defendants in error, from the reports of this court, are distinguishable from this. In United States *vs.* Crosby, 7 Cranch, 115, the United States claimed land in Massachusetts under conveyance from a man whose only title thereto was derived from an instrument not under seal, while the Statutes of Massachusetts required a deed or convey-

ance under the hand and seal of the party to convey an estate of freehold in land. The instrument was executed in the Island of Grenada, in the West Indies, according to the method prescribed by the laws of that colony for conveying land. The court said that the *lex reisitae*, and not the *lex loci contractus*, governed the case, and that the instrument conveyed no title. The case would be analogous to this if the United States claimed this land under a will executed in a foreign country, according to the laws thereof, and not according to the laws of New York. And this was the point decided in McCormick *vs.* Sullivant, 10 Wheat., 192, which the defendants in error also rely upon.

The question of jurisdiction involves to so large an extent a consideration of the merits of the case that it has been found necessary to discuss the latter to some extent. But it is believed that enough has been said to show that the case presents not only a Federal question, but a very grave Federal question, for the consideration of the court, and that the court therefore has jurisdiction to re-examine it.

The question is not raised in the present record, whether, if the United States did take the lands devised, the devise is coupled with a trust. The surrogate decreed that as to the personalty the trust was void, and the United States took the property as absolute owner; and this part of his decree was not appealed from. There would seem to be no reason why the United States cannot be the trustee of a public charity, as in the case of the Smithsonian Institution.

1 Perry on Trusts, §§ 40, 41.

President of the United States *vs.* Drummond, cited in 7 H. L. Cas., 141, 155.

See also Tyler *vs.* Hand, 7 How., 573.

The contrary decision in Levy *vs.* Levy, 33 N. Y., 97, is only that of a majority of the court, and was not appealed from; and the reasoning, to say the least, is not very satisfactory.

This devise was undoubtedly a good charitable trust.

Newland *vs.* Attorney-General, 3 Meriv., 683.

Nightingale *vs.* Goulburn, 5 Hare, 484, s. c. 2 Phil., 594.

Ashton *vs.* Lord Langdale, 4 De Gex & Sm., 402.

Coggshall *vs.* Pelton, 7 Johns. Ch., 292.

Cresson's Appeal, 30 Penn. St., 437.

Perin *vs.* Carey, 24 How., 506.

2 Perry on Trusts, §§ 697, 704, 705, and cases cited.

And would formerly have been sustained in New York as a valid public charity.

Coggshall *vs.* Pelton, 7 Johns. Ch., 292.

Potter *vs.* Chapin, 6 Paige, 639.

Williams *vs.* Williams, 4 Seld., 525.

Inglis *vs.* Sailor's Snug Harbor, 3 Pet., 112.

2 Kent Com., 285, 286, and note; 4 Ibid., 507, 508.

The recent decisions in New York seem to have completely upset the law as it was previously understood; but even now, if the devisee is capable of taking as trustee, it would seem that the trust in this case might be sustained. The New York decisions are carefully reviewed in 2 Perry on Trusts, (2d ed.,) pp. 377–379.

It is hardly necessary to say that the question whether this is a valid, charitable trust, cannot be affected by the fact that there is no court that has jurisdiction to enforce the trust.

Vidal *vs.* Girard, 2 How., 196.
1 Perry on Trusts, § 40.

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In the Supreme Court of the United States.

OCTOBER TERM, 1876.

THE UNITED STATES
v.
ANNIE FOX & OTHERS. } No. 104.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

Brief for the United States.

In the Supreme Court of the United States.

OCTOBER TERM, 1876.

THE UNITED STATES
v.
ANNIE FOX & OTHERS. } No. 104.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Charles Fox, of the city of New York, by his will, dated July 16, 1864, devised and bequeathed all the residue of his property, real and personal, after the payment of his debts, "*to the Government of the United States at Washington, District of Columbia, for the purpose of assisting to discharge the debt contracted by the war for the subjugation of the rebellious Confederate States.*" This devise included sundry parcels of land situate in the State of New York. (Record, 5, 6.)

The surrogate for the county of New York, upon the will being propounded for probate by the United States through its attorney, decreed :

"That the said last will and testament is inoperative and invalid and void as a devise of real estate.

"That said petitioner, the United States of America, is not entitled to and cannot lawfully take, receive or hold as devisee, in trust or otherwise, under said will and testament, the real estate devised thereby or any part thereof.

"That the real estate of the said Charles Fox, deceased, descends to his heirs at law.

"That the said petitioner, the United States of America, is the same artificial *person* or body politic or corporate described in said last will and testament as the Government of the United States, at Washington, District of Columbia.

"That the said last will and testament is valid and operative as to the personal estate of the testator.

"That as to the personal estate, the petitioner, the United States of America, is the sole legatee under said will, after the payment of all lawful debts.

"That no lawful trust as to real or personal estate is created by or vests under said will in the petitioner, the United States of America.

"That as to personalty, the bequest in said will to petitioner is not operative as a trust, but as an absolute gift, the terms of said bequest respective to the purpose thereof constituting no legal restriction upon the use of the legacy.

"That said instrument is admitted to probate as a will of personal estate only." (Rec., p. 73.)

From this decree the United States appealed to the supreme court of the State, which affirmed the same, (Record, 81; 63 Barb., 158,) and thence to the court of appeals, which also affirmed the decree, (Record, 85; 52

N. Y., 530,) and thereupon the United States sued out a writ of error to this court.

The contestants of the will moved, at the October term, 1876, to dismiss the writ of error for want of jurisdiction. It was directed that this motion be argued with the merits of the cause and when it was reached in its regular order, the motion being based upon grounds very analogous to, if not identical with, those involved in the general discussion of the case.

STATUTES.

"A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, * * * * * * * where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court on writ of error." (Rev. Sts., 132, § 709; 1 Sts. at Large, 85; 14 Ibid., 386.)

The act passed by the New York legislature and approved March 3, 1787, c. 47, declared that every person having an estate in fee, or of inheritance, &c., "shall have full and free liberty, power, and authority to give, dispose of, will or devise it to any person or persons (except bodies politic and corporate) by his last will and testament in writing," &c., "at his own free will and pleasure." (1 Greenleaf's Laws, 386–7.)

In the revision made in 1828, Chap. VI, Title 1, Art. 1, "Of wills of real property and the proof of them," it was provided:

"SECTION 1. All persons, except idiots, persons of unsound mind, &c., may devise their real estate by a last will and testament, duly executed according to the provisions of this title.

"SEC. 2. Every estate and interest in real property descendible to heirs, may be so devised.

"SEC. 3. Such devise may be made to every person capable by law of holding real estate; but no devise to a corporation shall be valid, unless such corporation be expressly authorized by its charter, or by statute, to take by devise." (2 Rev. Stats., 56, 57.)

In the compilation of 1869 the foregoing sections appear in precisely the same phraseology. (New York Statutes at Large; 2 Rev. Stats., 58.)

ASSIGNMENT OF ERRORS.

1. The United States assign for error the final decree of the court of appeals, being the highest court of the State of New York, affirming the decree of the general term of the supreme court of that State, (Record, 88, folio 176,) by which it was "ordered and adjudged that the decree of the surrogate of the county of New York, (hereinbefore recited,) made and entered on the 24th day of March, 1871, mentioned in the appeal of the appellants and in the petition of the appeal to this court, be, and the same is hereby, affirmed with costs." (Record, 81, folio 156.)

2. The plaintiffs in error assign for error the decree of the court of appeals of the State of New York affirming the judgment of the supreme court of that State, which affirmed the judgment and decree of the surrogate of the city of New York, (Record, 73,) "that said last will and testament is inoperative, invalid, and void

as a devise of real estate; that the petitioner, the United States of America, is not entitled to, and cannot lawfully take, receive, or hold, as devise in trust or otherwise, under said last will and testament, the real estate devised thereby, or any part thereof; that the real estate of the said Charles Fox, deceased, descends to his heirs at law; that no lawful trust as to real or personal estate is created by or vests under said will in the petitioner, the United States of America; that as to personalty, the said bequest in said will to petitioner is not operative as a trust, but as an absolute gift, the terms of said bequest respecting the purpose thereof constituting no legal restriction upon the use of the legacy; that the said instrument is admitted to probate as a will of personal estate only."

BRIEF.

I.

We respectfully submit that the question presented by the motion to dismiss is identical with that which arises upon the merits. The motion is predicated upon the assumption that the record presents no Federal question; but to us it seems that it was only and purely upon such a question that the parties were at issue.

The plaintiffs claimed, under and by virtue of their constitution, the title, right, and privilege to hold these lands devised to them by Charles Fox, and immunity from that legislation of the State of New York which denies to corporations (unless specially authorized by their statutes) the right to take or hold devised real estate. (Clements *v.* Berry, 11 Howard, 398; The Banks *v.* The Mayor, 7 Wallace, 22.)

The decision, adverse to the proponents of the will, was a determination that the Constitution of the United States did not confer power upon the Government to take and hold devised lands within the State of New York; for if the national Constitution did permit this to be done, no State legislation could take away or abridge this right; nor, if the Constitution withheld the right, could any State give or enlarge it. (McCulloch *v.* Maryland, 4 Wheaton, 404; Sch. Exchange *v.* McFaddon, 7 Cranch, 136; Runyon *v.* Coster, 14 Peters, 130.)

A perusal of the Constitution ascertains that there is no express declaration of a power to accept a devise or bequest of property to be applied to national uses. If it exists, it is as an implication from those conferred in terms, or from the fact of the creation and existence of the Federal sovereignty.

When the people of the United States instituted their frame of government, they bestowed upon it those rights and powers which they understood to pertain to sovereignty, "with all which that term implies"—certainly, at least, so far as those rights and privileges were "necessary and proper" to the discharge of the peculiar functions of the General Government. Their ideas of those rights, powers, and privileges were derived from the constitution of the mother country. If the experience of a century in peace and war has demonstrated anything, it is that the more liberal interpretation of the Constitution will better subserve the purposes for which it was ordained than will the restricted one, which has been carried so far as to deny that it authorized the use of force to prevent its own destruction. The people changed the league of States, so as to create a supreme

Government. (Marvin *v.* Hunter, 1 Wheaton, 304, 324; 4 Wheaton, 404; Gibbons *v.* Ogden, 9 Wheaton, 187.)

As it was stated in the brief filed upon the motion to dismiss, "It is submitted that among the prerogative powers enjoyed by the United States Government, under the Constitution, as necessarily inherent in its sovereign character and essential to the proper exercise of its sovereign functions, is that of acquiring property for public purposes in every part of the country, by all the usual methods known to the law; and that this power extends to real property as well as to personal, and to taking by devise as well as by ordinary conveyance. Indeed, it is difficult to see any distinction in respect of this between real and personal property and between devises and conveyances. If a State can forbid the Government from taking real estate by devise, it may forbid its taking by grant;" if it can prevent its taking realty, it can personalty.

Marshall, C. J., said, in delivering his opinion in United States *vs.* Maurice, 2 Brock., 109, answering the objection that the United States could enter into no contract not previously directed by statute, "The United States is a Government, and consequently a body politic and corporate, capable of attaining the objects for which it was created by the means which are necessary for their attainment. This great corporation was ordained and established by the American people, and endowed by them with great powers, for important purposes. Its powers are unquestionably limited; but while within those limits, it is a perfect government as any other, having all the faculties and properties belonging to a government, with a perfect right to use them freely, in order to accomplish the objects of its institutions. It

will certainly require no argument to prove that one of the means by which some of these objects are to be accomplished is contract; the Government, therefore, is capable of contracting, and its contracts may be made in the name of the United States."

This court indicated its assent to these propositions, in the case of the United States *v.* Tingey, 5 Peters, 128, where it held, per Story, J.: "Upon full consideration of the subject, we are of opinion that the United States have such a capacity to enter into contracts. It is, in our opinion, an incident to the general right of sovereignty," &c. And it had long before been decided that suit might be maintained by the United States upon such a contract without legislative authority first obtained. "It would be strange to deny to them a right which is secured to every citizen of the United States." Dugan *v.* United States, 3 Wheat., 181; Cotton *v.* United States, 11 Howard, 231.) Upon judgments recovered in such suits it is an every-day occurrence for the United States to seize, hold, and sell land. (United States *v.* Bradley, 10 Peters, 359; United States *v.* Lynn, 15 Peters, 311.) In 1870, referring to the United States *v.* Tingey, this court said, per Swayne, J.: "The decision was put upon the ground that the Government had the capacity to make the contract; that the United States were a body politic, and that, as *incident to the general right of sovereignty*, it was competent to enter into any contract not prohibited by law, and found to be expedient in the just exercise of the powers confided to it by the Constitution. "Dugan *v.* United States, 3 Wheat., 172, was referred to as sustaining this proposition. It was remarked that *a different principle would involve a denial to the General and the State governments of the*

ordinary rights of sovereignty." (United States *v.* Hodson, 10 Wallace, 407.)

Except as involved in the power to borrow money, and to purchase sites for public works, there is no power to contract expressly given in the Constitution; none is explicitly conferred to make such contracts as were the foundation of the suits in which the decisions above cited were rendered. Nor, it will be perceived, is this right to contract placed, in these opinions, upon any particular constitutional provision, but is implied from the creation by the people of a sovereignty to which such a right is presumably incident. "Among the enumerated powers we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental and implied powers, and which requires that everything granted shall be expressly and minutely described. Even the tenth amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word 'expressly,' and declares only that the powers 'not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people;' thus leaving the question, whether the particular power which may become the subject of contest has been delegated to the one government or prohibited to the other, to depend upon *a fair construction of the whole instrument.* (McCulloch *v.* Maryland, 4 Wheaton, 466.) The familiar argument in this case, and in the other kindred opinions of Chief-Justice Marshall, established conclusively the existence of implied powers derived from, and to effectuate the purposes of, those expressly conferred by the Constitution. Even the ablest

commentators have found little to do but to state the process of reasoning pursued in these opinions, which gave to the Constitution a force and character that alone made it worth defending. (1 Kent's Com., Lecture XII, and *251–4; 1 Story on Const., § 433 *et seq.*; 2 Story on Const., §§ 1236–1294; Cooley's Const. Lim., *63.)

To this court, for its expositions and construction of the Constitution, which have made it valuable and practically useful to subserve all the demands of a century of change, a vast extension of territory, and a tenfold increase of population, the people are even more indebted than to the original founders of that instrument.

The Constitution contains no express recognition of the power to take land for public uses by right of eminent domain. For more than three-quarters of our national existence it was either not exercised, or only through the assent and agency of the several States, and it is but recently that it has been exerted solely through federal legislation and courts. In a debate in the Senate, April 19, 1860, participated in by Messrs. Bayard, Collamer, Gwin, Mason, Wigfall, Fessenden, and Jeff. Davis, the existence of this right was controverted by most of these Senators, and the bill to regulate its exercise defeated. (Cong. Globe, A. D., 1859–'60, Part 2, pp. 1790–'92, and Part 4, p. 3297.) In New York the right was exercised through the State court, under the authority of State statutes. (United States *v.* Dumplin Island, 1 Barb., 24.) But though long dormant, this power always existed, and was necessarily implied in the very idea of sovereignty. (Kohl *v.* United States, 91 U. S., 371 *et seq.*)

The exercise of the right of eminent domain in this way is a taking of land for a public use. Being entitled to do

this by a process *in invitum*, it would certainly seem that it might also accept land, for another and different public use, when voluntarily donated or devised. It has the power to acquire land—to take and hold it for public purposes. It not only does so in cases like that of Kohl *v.* United States, but in those numerous instances in which land is acquired, with or without judicial proceedings, in order to secure, liquidate, or compromise debts due to the government. Power to bind and accept land for these purposes has been recognized, by legislation and decisions, ever since the early days of the republic. The validity of the statutes giving priority to debts due to the United States is *inferred* from the clause relating to the payment of the public debt, because this is an appropriate means of accomplishing this purpose. (United States *v.* Fisher, 2 Cranch, 396; Metropolitan Bank *v.* Van Dyck, 27 N. Y., 437.) The act of July 11, 1798, c. 72, § 15, (1 Stats., 594,) gives a lien upon the real estate of debtors to the Government and provides for the sale of it; which right has been continued and extended down to the present time. (R. S., §§ 3629, 3630.) It defeats the lien of prior judgment-creditors upon real estate. (Thelusson *v.* Smith, 2 Wheaton, 396; United States *v.* Duncan, 4 McLean, 607, and 12 Ill., 223; United States *v.* Mechanics' Bank, Gilpin, 51.) A similar royal prerogative in England "goes back as far as the period of legal memory." (Giles *v.* Grover, 9 Bing., 128, 192; Hoke *v.* Henderson, 3 Dev., N. C., 17.)

Thus we see that the Government may not only take land with the strong hand for the purpose of erecting forts and buildings thereon, but in order to obtain payment of its dues, that it may more readily satisfy its own creditors. (Neilson *v.* Lagow, 12 Howard, 98–108.)

True, the necessity is more stringent in the one case than in the other; but the degree of necessity is of no consequence, as was declared in this case of United States *v.* Fisher, relating to the priority of the claims of the Government upon its debtors, and in repeated decisions since. That claim was based on the constitutional provision relating to the payment of the public debt, to accomplish which "Congress must possess the choice of means, and must be empowered to employ *any* means which are in fact *conducive* to the exercise of a power granted by the Constitution. The Government is to pay the debt of the Union, and must be authorized to use the means which appear to itself most eligible to effect that object." (United States *v.* Fisher, 2 Cranch, 396.) "Let the end be legitimate; let it be within the scope of the Constitution; and *all* means, which are appropriate, which are plainly adapted to the end, and which are not prohibited, but are consistent with the letter and spirit of the instrument, are constitutional." (2 Story on Const., § 1255; McCulloch *v.* Maryland, 4 Wheaton, 420–3; Legal Tender Cases, 12 Wallace, 536 *et seq.*; Hepburn *v.* Griswold, 8 Wallace, 614 *et seq.*) The power to make its notes a legal tender is deduced from the power to borrow money and to pay the debt. (Same cases; Metropolitan Bank *v.* Van Dyck, 27 N. Y., 400.)

Certainly, if priority of claim upon the estates of its debtors be a legitimate deduction from this power of paying the public debt and caring for the general welfare, *a fortiori* should the acceptance of lands and goods voluntarily offered be deemed "*bona fide*, appropriate to the end." It is directly conducive to the end proposed; vastly more so than those instances of legislation named in the legal-tender cases, 12 Wallace, 537, to the purposes there mentioned.

Not only does the United States acquire lands by right of eminent domain, by conveyance, by levy and civil procedure, but it may also acquire them within the limits of a State, and without its assent, by conquest. (Titus *v.* United States, 20 Wallace, 483; United States *v.* Huckabee, 16 Wallace, 434; or under confiscation acts. Union Ins. Co. *v.* United States, 6 Wallace, 759.) The power to take and hold lands, either by contract or by force, cannot be denied.

II.

Objection is made that the United States are to hold these devised lands in trust. All property taken by it, real or personal, by right of eminent domain, by force or contract, is held upon the same trust, for public purposes. Land taken by its right of priority or with other creditors is taken upon this identical trust, that they shall be converted into funds to aid in paying the public debt. "As a party to the suit, no one doubts the power of the Government, through its properly authorized agent, to direct the course of the suit as shall best advance the public interest. If a compromise be necessary for that interest, it may be made. That was what was done in the present case. The lands were taken, not as a purchase, but to secure the debt of the late receiver. And these lands were sold on a credit, in order that the sum due by the receiver might be paid. *It was a case of trust, recommended by the public interest,* and opposed to no law or public policy." (United States *v.* Lane, 3 McLean, 367; Vidal *v.* Girard, 2 Howard, 187.)

The question is not whether or no the United States,

as a landed proprietor, are subject to the *lex rei sitæ*, like other land-holders, but as to their right to be a proprietor. Their rights and liabilities upon bills of exchange are the same as those of individuals, (United States *v.* Bank of Metropolis, 15 Peters, 392; Bank of United States *v.* United States, 2 Howard, 711; United States *v.* Barker, 12 Wheaton, 561, and 4 Wash. C. C., 454; Dixon *v.* United States, 1 Brock., 177; United States *v.* Wilder, 3 Sumner, 308;) but their right to *issue* such bills is not created, dependent upon, nor affected by local law.

III.

It is sufficiently well established that the United States may take by grant.

As a rule, all persons, natural or artificial, who can take by grant can also take by devise, and in fee or in trust. (Vidal *v.* Girard, 2 Howard, 187; 1 Perry on Trusts, chap. 2, §§ 38–45.)

"The sovereign may sustain the character of a trustee." (1 Perry on Trusts, § 40.) "The United States, and each one of the separate States, may sustain the character of a trustee. They have legal capacity to take and execute trusts for every purpose." (*Id.*, § 41.) In the following sections he states generally the power of corporations to accept trusts, and especially such as relate to matters in which the corporations have an interest.

Here the devise and trust were those in which the Government and the people it represents were solely interested.

The famous will of Peter Thelluson directed that, in case of the failure of issue, or of their refusal to bear his surname, his estate was to go to the King for the

benefit of the sinking-fund. (Thelluson *v.* Woodford, 4 Vesey, 235; Boyle on Charities, 60.)

In Newland *v.* The Attorney-General, 3 Mer., 684, stock was bequeathed "to His Majesty's government, in exoneration of the national debt." Lord Eldon directed it to be transferred to such person as the King, under his sign-manual, should appoint.

IV.

The decree alleged by us to be erroneous sets up the hereinbefore-cited statute of New York as taking the United States out of the scope of this general principle. Two answers may be given to this proposition, viz: 1. That the statute does not purport to include the United States within its terms; and, 2. That it would not be competent for the State legislature so to affect Federal powers and rights, even if such were the intention.

1. "It is a familiar principle that the King is not bound by any act of Parliament unless he be named therein by special and particular words. The most general words that can be devised, (for example, any person or persons, bodies politic or corporate,) affect not him in the least, if they may tend to restrain or diminish any of his rights and interests. He may even take the benefit of any particular act, though not named. The rule thus settled respecting the British Crown is equally applicable to this Government, and it has been applied frequently in the different States, and practically in the Federal courts. It may be considered as settled that so much of the royal prerogatives as belongs to the King in his capacity of *parens patriæ*, or universal trustee, enters as much into our political state

as it does into the principles of the British constitution." (Savings Bank *vs.* United States, 19 Wall., 239.)

The doctrine as to statutes, above referred to, with its limitations, is well stated in Chitty on Prerogative, 382–384, and is recognized and established in New York in favor of the State. (People *vs.* Gilbert, 18 Johns, 227; People *vs.* Rosseter, 4 Cow., 143.)

"But independently of any doctrine founded on the notion of prerogative, the same construction of statutes of this sort ought to prevail, founded upon legislative intention. Where the Government is not expressly, or by necessary implication, included, it ought to be clear from the nature of the mischiefs to be redressed, or the language used, that the Government itself was in the contemplation of the legislature, before a court of law would be authorized to put such an interpretation upon any statute. In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to them applies with very different, and often with contrary, force to the Government itself. It appears to me, therefore, to be a safe rule, founded in the principles of the common law, that the general words of a statute ought not to include the Government, or affect its rights, unless that construction be clear and indisputable upon the text of the act." (United States *v.* Hoar, 2 Mason, 314; United States *v.* Davis, 3 McLean, 483.)

The first clause of the section under examination says: "§ 3. Such devise may be made to every person capable by law of holding real estate." This would embrace corporations as well as individuals, artificial as well as natural persons. (The Binghamton Bridge, 3 Wallace,

52; Ang. and Ames on Corps., 1; 2 Kent's Com., *215; Dartmouth College *v.* Woodward, 4 Wheaton, 636; Beaston *v.* Bank, 12 Peters, 102,) and books and reports, *passim.*

"It is a rule of construction acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power that which was not granted; that which the words of the grant could not comprehend." (Gibbons *v.* Ogden, 9 Wheaton, 191.)

The exception found in the concluding clause of the section in question obviously relates only to such corporations as are created or authorized by statute or charter of the State. Its language shows that the great political corporation, created by the people themselves, was not in the mind of the legislature in enacting this statute. Nor was the Government at all within the mischiefs to be remedied. (McCaughal *v.* Ryan, 27 Barb., 408, *et seq.*)

2. If the legislature can be supposed to have intended to act upon and limit the capacity of the Federal Government to take lands, the attempt was beyond the scope of its authority and futile. The United States have the power to take; "the existence of this power must negative the existence of any right which may conflict with and control it." (Johnson *v.* McIntosh, 8 Wheaton, 588.) "If the right to acquire property for such uses may be made a barren right * * by the action of a State, prohibiting a sale [and a sale can be prohibited as well as a devise] to the Federal Government, the constitutional grant of power may be rendered nugatory, and the Government is dependent for its practical existence

upon the will of a State." (Kohl *v.* United States, 91 U. S., 371, *et seq.*; Weston *v.* Charleston, 2 Peters, 468.)

V.

The argument that the statute is a restraint upon the power of the citizen to devise, and not upon that of the Government to accept, is a mere subterfuge. A tax on the contractors carrying the mail is a tax on the mail, because ultimately paid by the Post-Office Department. (Achison *v.* Huddleson, 12 Howard, 293, 298; Searight *v.* Stokes, 3 Howard, 168; Neil *v.* Ohio, 720, 742–3.) A tax on a contract affects the power to borrow. (Weston *v.* Charleston, 2 Peters, 468.) A tax on capital is a tax on the stock in which it is invested. (The Bank-Tax case, 2 Wallace, 208–9.) A license-tax for the sale of goods is a tax on the goods. (Welton *v.* Missouri, 91 U. S., 275; Brown *v.* Maryland, 12 Wheaton, 425, 444; Ward *v.* Maryland, 12 Wallace, 418; Woodruff *v.* Parham, 8 Wallace, 123; State Freight Tax, 15 Wallace, 232.)

VI.

The fact that the case turns upon the construction of a New York statute does not oust the jurisdiction of this court. (Smith *v.* Maryland, 6 Cranch, 286; Fairfax *v.* Hunter, 7 Cranch, 603; Martin *v.* Hunter, 1 Wheaton, 304; Ohio Trust Company *v.* De Bolt, 16 Howard, 432–3; Gelpcke *v.* Dubuque, 1 Wallace, 216.)

It is only *where no right is claimed under the authority of the United States*, in opposition to a State statute, that the construction by the State courts of State legislation is final. (Congdon *v.* Goodman, 2 Black, 574; Mich. Cent. R. R. *v.* Mich. So. R. R., 19 Howard, 378; Lytle

v. Arkansas, 22 Howard, 203; Porter *v.* Foley, 24 Howard, 415; Attorney-General *v.* Federal Street Meeting-House, 1 Black, 262; Green *v.* Van Buskirk, 5 Wallace, 307.)

If the constitutionality of the State statute (as against the Federal Constitution) *must* have been drawn in question, as this is apparent from the whole record, this court has jurisdiction. (Wilson *v.* Blackbird Creek Co., 2 Peters, 250; Satterlee *v.* Mathewson, *Id.*, 409, 410; Craig *v.* Missouri, 4 Peters, 410; Furman *v.* Nichol, 8 Wallace, 56; Bolling *v.* Lersner, 91 U. S., 594.)

VII.

In the case of the Smithsonian Institution, this Government took by devise, to a charitable use. No matter whether the will was probated here or in England, the property was taken and the use executed here. The statute relating to it was not passed till after the will was proved. (Act of August 10, 1846, c. 178, § 1–9, Stats., 102; President of United States *v.* Drummond, cited in Whicker *v.* Hume, 7 House of Lords, 155.)

This devise was undoubtedly a good charitable trust. (Newland *v.* Attorney-General, 3 Meriv., 683; Nightingale *v.* Goulburn, 5 Hare, 484, s. c. 2 Phil., 594; Ashton *v.* Lord Langdale, 4 De Gex and Sm., 402; Coggshall *v.* Pelton, 7 Johns. Ch., 292; Cresson's Appeal, 30 Penn. St., 437; Perin *v.* Carey, 24 How., 506; 2 Perry on Trusts, §§ 697, 704, 705, and cases cited.)

It would formerly have been held good in New York, and the recent decisions there to the contrary are a change of position, not yet fully acquiesced in. In an elaborate note, 2 Perry on Trusts, § 748, it is said that even in New York, "there seems to be a want of con-

fidence in the stability of the system,' and a want of agreement both among the lawyers and judges, so that the whole matter is yet in a transition state.'

VIII.

If an act of Congress were necessary, (as in the case of Smithson's will, one was enacted after the will was proved,) this would not affect the validity of the instrument. (Inglis *v.* Sailors' Snug Harbor, 3 Peters, 112; 2 Perry on Trusts, § 730, and cases cited.)

The assent of a devisee or legatee will be presumed on very slight evidence. It is enough that the attorney of the United States propounded the will for probate, and that it is presented here by the Government. "The United States will be admitted to be a corporation It is incidental to a corporation to sue and be sued, to convey and to take property. Proper organs for conveying must certainly be provided before this power can be executed; *but if it be incidental to this ideal being to receive, then a conveyance to it, or an obligation to it by its proper name*, unless there be no person to whom it can be delivered. *A claim to the obligation, by the officer authorized by law to assert that claim, would seem to be sufficient evidence of assent to the contract*, and if there be any person appointed to transact the particular business, a delivery to him would be a good delivery." (Dixon *v.* United States, 1 Brock., 181; Osborn *v.* United States, 9 Wheaton, 830–1.)

would be valid

IX.

The will should have been admitted to probate. Private citizens have no right to set up the incapacity of the United States, or any other corporation, to take if

the State does not intervene for this purpose. (Vidal *v.* Girard, 2 Howard, 191; Girard *v.* Philadelphia, 7 Wallace, 14; 1 Perry on Trusts, § 45, and cases cited.)

X.

From a full conviction that this instrument will be found valid in its full extent and precise terms, no discussion will be had of the doctrine of an equitable conversion of the realty, presented to the court below, but that proposition will be submitted without argument.

EDWIN B. SMITH,
Assistant Attorney-General.

In the Supreme Court of the United States,

October Term, 1874.

THE UNITED STATES,

Plaintiffs in Error,

vs.

ANNIE FOX AND OTHERS,

Defendants in Error.

In Error to the Court of Appeals of the State of New York.

Brief Submitted by the Defendants in Error.

JAMES FLYNN,

Counsel for Defendants in Error,

No. 7 Warren St., New York City.

In the Supreme Court of the United States.

OCTOBER TERM, 1874.

THE UNITED STATES,
Plaintiffs in Error,

vs.

ANNIE FOX AND OTHERS,
Defendants in Error.

Brief submitted by the Defendants in Error.

Statement of Facts.

On the 16th day of July, 1864, Charles Fox, of the city of New York, made his last will and testament (fols. 17. 18), whereby he devised, or which purported to give or devise, to the Government of the United States, at Washington, certain real estate, situated in the city of New York and elsewhere, for the purpose of assisting to discharge the debt contracted by the war, and thereafter on the 2d day of February, 1870, the said testator died (fol. 16). The United States District Attorney for the Southern District of New York then applied by petition to the surrogate of the city and county of New York to admit the said will to probate (fol. 16).

The infant heirs of said Fox contested the will (fols. 21, 23.)

The surrogate decided that the will was "inoperative, invalid

" and void as a devise of real estate," and that the United States was not entitled to and could not lawfully " take, receive " or hold, as devisee in trust, or otherwise, under said last will " and testament, the real estate devised thereby or any part " thereof." He also held and decided that the will was good as a will of personal estate, and that the United States was sole legatee, and could take the personal estate as such (fol. 138).

The United States appealed from that decision to the Supreme Court (fols. 139, 140, 142), where the said decree was affirmed (fols. 155, 156). The United States then appealed to the Court of Appeals of the State of New York (fols. 159, 160), where the judgment appealed from was affirmed (fols. 12, 13, 14), and the record was thereupon remitted to the Supreme Court to be enforced as the judgment of that court (fol. 14), and by order of the Supreme Court judgment was then entered in accordance with the decision of the Court of Appeals (fols. 161, 162, 163, 164, 165, 166, 167).

A writ of error to remove the cause to the Supreme Court of the United States for review was then applied for and granted on the grounds (fols. 1, 2, 3):

1. That there " was drawn in question the validity of an " authority exercised under the United States."

2. That there " was drawn in question the validity of a stat- " ute of the State of New York as against the United States, " on the ground of its being repugnant to the Constitution of " the United States, and the decision was in favor of its va- lidity."

3. That there was " drawn in question the construction of " the Constitution of the United States in respect to its au- " thorizing the said United States to take real estate devised " to it, and the decision was against the title to said real es- " tate set up and claimed under said Constitution."

And now the heirs of said testator, the defendants in error, apply to dismiss the appeal or writ of error, for want of juris-

diction, claiming that no such matters or rights were drawn in question, and that neither section 25 of the Judiciary Act, nor the Act of February 5, 1867, gave to the plaintiff in error the right to have the judgment in this case taken to the Supreme Court of the United States for review.

POINTS.

I.

" The validity of an authority exercised under the " United States," was not drawn in question by the record or proceedings in that cause or proceeding.

As the plaintiff in error defines or explains it, he claims that the authority of the secretary of the treasury or other proper officer of the United States, to receive on behalf of the United States, the property real and personal, bequeathed and devised, was questioned, and that the decision was against the validity of such authority.

It does not appear from the record nor from any proceeding in the cause, that any such question was before the court, or that the court decided any such thing.

No authority had been or was being exercised under the United States, or by any officer of the United States. Nothing done by any such officers was held invalid.

The devise was of land situated in the State of New York, and the will was made by a citizen of that State, in pursuance of the *statutes of that State*, and the court simply held that the United States of America was not entitled to and could not lawfully take the real property under *that will*, made in pursuance of the New York statutes, which did not authorize such a disposition by will or devise of real property within its limits.

The acts done were done by the testator and the surrogate, and the only authority exercised was so exercised under the statutes of the State of New York.

There are many cases where the validity of acts done by

officers, agents or employes of the general government are drawn in question in State courts, and the words in the Judiciary Act and Act of 1867. "*Authority exercised under the United States*" has reference to such cases; but it would be a forced and extraordinary construction of the act to hold it to extend to a case where no authority has been exercised under the United States, where no act done by any officer, agent or other person, has been done under the direction of, or in pursuance of, any law of the United States, and where no such act or proceeding has been held invalid.

The act of Congress does not purport to nor was it ever intended to apply to any such case.

This court has uniformly held that to entitle a party defeated in a State court to bring his case to this court for review by writ of error, the case must be brought *clearly* and indisputably within the provisions of the act of Congress.

Ocean Ins, Co. *vs.* Polleys, 13 Peters, 157, 164.
Commercial Bank of Cincinnati *vs.* Buckingham's Exrs., 5 How., 317, 341, 342.
(See other cases cited in the following 3d Point.)

Even if the question had been raised, and the court had held that the secretary of the treasury, or other officer of the United States, could not or had not authority to receive the property devised by that will, that would not have been drawing in question the validity of an authority exercised under the United States, for these among other reasons.

1. No authority has or had been exercised. The statute, does not provide for the case of an act not yet done, and which may never be done, or for the case of a decision that an authority cannot be lawfully exercised, which has never been, and may never be exercised or attempted.

2. The question could not arise in this case in any form. The secretary of the treasury and other officers are but agents of the government. They are not the government. Their authority to receive and hold property belonging to the government, or to do any other act for the govern-

ment, is simply their commission or power of attorney and a question of the sufficiency of that cannot, or at least has not, in any form, come in question in this case. The question is a question of *title* of their principal, and not of the sufficiency of the power or authority given to them to act for their principal.

When the question of title is established in their principal, and these officers or agents in the exercise of the power conferred on them, deal with or dispose of the property, or bring actions to recover it, a question as to the validity of an authority exercised by them, may be brought in question, but not before.

It cannot be necessary to consider this question further. The writ cannot be sustained, because of this assignment or ground of error.

II.

Neither is the second ground or assignment of error warranted by any facts in the case.

There was not drawn in question the *validity* of any statute of the State of New York, nor was any statute of the State held or claimed to be repugnant to the Constitution of the United States. The United States did not claim the property under or because it was given by the Constitution of the United States, nor was the will or devise based upon, authorized, or regulated by the Constitution of the United States.

The right to dispose of land by will or devise, and the validity of the devise, are regulated and governed solely by State laws.

White *vs.* Howard, 46 N. Y., 144.
Levy *vs.* Levy, 33 N. Y., 136.
United States *vs.* Crosby, 7 Cranch., 115.
McCormick *vs.* Sullivant, 10 Wheaton, 192.

A statute of the State of New York authorized the disposi-

tion of real property within the State, under certain restrictions, and the only right the testator in this case had to dispose of his property by will or devise was given by that statute, as *by the common law he had no such rights.*

The testator in thus attempting to dispose of his property devised it to the "United States of America," and the question arising on that will was not whether the statute was *valid* or not, *but whether the statute authorized such a disposition of his property or whether it authorized him to make such a will.* It was a question, as to the meaning and effect of the statute, purely a question of *construction.*

Commercial Bank of Cincinnati *vs.* Buckingham's Exrs., 5 How., 317, 341, 342.

The United States did not claim that the statute was *invalid,* but only that the statute as it reads authorized the testator to devise his land to the United States and to make the United States a trustee for its own creditors. The United States was the petitioner offering the will for probate, and was not in a situation to question the validity of the statute, as questioning that would be questioning the validity of the will itself. Suppose on the appeal the United States had claimed and the court had held that the statute was void, the will would have fallen with it. It will thus be seen that the statute was not claimed on the part of the United States to be invalid, and if the validity of the statute had been in question and had been held valid it would not have been a decision against the United States, but on that question would have been in its favor.

Again, it is claimed by the plaintiff in error that the validity of the statute was in question and held valid against the right of United States, but that it was held valid on the ground that it was *repugnant* to the Constitution.

To be *repugnant* to the Constitution it must be *contrary to* or *opposed to* the Constitution. It must deny to the United States a right which the Constitution gives, and which the United States could exercise, if the statute was not in existence.

Does the United States Constitution provide for the disposition of land in the several States by will or devise?

Are not those State rights governed by and depending on State laws?

Does the Constitution restrict the right of a State to provide for and regulate the disposition of property, within its limits, by will or devise? The law on this subject is too well settled and too well known to leave it a debatable question.

There is nothing in the Constitution on the subject, and nothing there for that statute to be repugnant to. It might as well be claimed that a statute of any foreign country, regulating the disposition of its real estate, by will or devise, is repugnant to the Constitution of the United States. There was never such a question in this case.

In the assignment of errors (fol. 8) it is claimed or alleged, *not that the statute is invalid*, but that as *construed by the courts*, it was drawn in question, and that the decision was in favor of its validity *as construed*.

Can there be a more complete *felo de se* than this?

Is there not here an admission that it was a question of the *construction* or *meaning* of a statute, and not a question of its validity?

And, that being so (assuming that there was even a question of construction before the court), the writ must be dismissed for want of jurisdiction, as was done in the case of the Commercial Bank of Cincinnati *vs.* Buckingham's executors, before cited, 5 How., 341, 342.

III.

The other ground or assignment of error has still less to support it. It is there alleged that the construction of the Constitution was drawn in question, in respect to its authorizing the United States to take real estate devised to it.

What clause of the Constitution was drawn in question? The plaintiff in error does not point out any, nor does the record show any.

The act of 1867, which supersedes or has repealed the pro-

visions of sec. 25 of the Judiciary Act, does not provide for assigning such a ground of error. But assuming that to be a proper assignment of error, there are these reasons why that ground of error is not good or sufficient to give this court jurisdiction to review the judgment in this cause by writ of error.

1. The writ and assignment of error should show what clause of the Constitution has been construed or drawn in question, or at least the *record* should.

   Gibson *vs.* Chauteau, 8 Wallace, 314.
   Railroad Co. *vs.* Rock, 4 Wallace, 177.
   Suydam *vs.* Williamson, 20 How., 427.
   Christ's Church *vs.* Co. of Philadelphia, 20 How., 26.
   Taylor *vs.* Morton, 2 Black, 481.
   Bridge Proprietors *vs.* Hoboken Co., 1 Wallace, 116.

2. It is not sufficient even that such a question might have been raised, or even that such a question was argued, but the *record must show* that the question was in fact *raised* and *necessarily* decided.

   The Ocean Ins. Co. *vs.* William Polleys, 13 Peters, 157.
   Crawford *vs.* Branch Bank of Mobile, 7 How., 279.
   Mills *et al. vs.* Brown *et al.*, 16 Peters, 525.
   Commercial Bank of Cincinnati *vs.* Buckingham, 5 How., 341.
   Murdock *vs.* City of Memphis, 20 Wallace, 590.
   Lawler *vs.* Walker, 14 How., 159.
   Parmalee *vs.* Lawrence, 11 Wallace, 38.
   R. R. Co. *vs.* Rock, 4 Wallace, 177.

How or where does it appear in the record in this case that any clause of the Constitution was in question or construed?

It is said in the assignment of errors that the construction of the Constitution was drawn in question "in respect

"to its authorizing the said United States to take real "estate devised to them" (fol. 8).

An examination of the record will show not only that the construction of the Constitution was not thus drawn in question, but that no such question was decided.

The decision of the surrogate (fol. 138), which was affirmed, was, that the United States could not take the real estate devised by *that will*, and that as a devise of real estate *that will* was void. It was not decided that the United States could not take real estate devised to them, or that the United States could not be a devisee, but simply that the statutes of the State of New York did not authorize a devise of land situated in that State to the United States of America, or, as expressed in the will, "to "the Government of the United States at Washington." That is what the surrogate decided, and all that the record shows.

Looking further at the opinions of the courts on appeal, which however are no part of the record (51 N. Y. Rep., 355; 36 N. Y. Rep., 316; 13 Peters, 164, 165; 8 Wall., 317), it will be seen that both the appellate courts were of the opinion that, under the common law, or under the New York Statutes, the United States could not, as devisee, take the land, not that the Constitution of the United States did, or did not, authorize it.

Justice Andrews, in delivering the opinion of the Court of Appeals in the case, says: "It is not necessary in this "case to decide whether the United States could, with the "consent of a State, accept a devise of lands made to it "directly and unaccompanied by any trust. In view of "the origin and nature of the power to devise lands, of the "right of each sovereignty to determine the limitations "under which this power shall be exercised, and of our "statute upon the subject, the devise to the United States "in the will in question cannot be sustained."

52 N. Y., 533.

It must be apparent, without further argument, that there was *not* "drawn in question the construction of the

Constitution of the United States," and that the jurisdiction of this court cannot be invoked or retained because of that or any such question in this case.

Nor is it true, as averred or set forth in the writ of error, that "the decision was against the title to said real estate, "set up and claimed *under the Constitution.*" No title was set up or claimed under the *Constitution.* The title was set up and claimed under the *Statutes of the State of New York* and the will.

Additional Points on the Merits.

IV.

If it shall be held that this court has jurisdiction to review the decision of the New York State courts on this writ of error, and shall examine the case on the merits, no error, we confidently believe, will be found in the case, and we respectfully submit that the judgment should be affirmed.

The reasons given by Justice Andrews, who delivered the opinion of the Court of Appeals in this case, reported 52 N. Y. Rep., 530, and imperfectly printed in the transcript of the record furnished on this hearing (pages 85, 86, 87, 88), seem to be entirely conclusive, and obviate the necessity of restating those reasons here. To that opinion reference is made; and for the reasons there stated it is claimed, on the part of the defendants in error, that the judgment should be affirmed.

V.

In the brief of the counsel for the plaintiffs in error, submitted in opposition to the motion to dismiss the writ for want of jurisdiction, he has, to some extent, discussed the case upon

the merits. He there, without disputing or denying that the disposition of, or right to take or dispose of land, by will or devise, is governed by and depends upon the laws of the State where the land is situated, concedes that a foreign corporation cannot take by devise under the New York statutes, yet he claims that in the State of New York the United States government is neither a foreign government nor a foreign corporation.

Without conceding that it would make any difference whether it is or not, it is insisted that for such purposes the general government in a State is a foreign government, and if a corporation at all, is there a foreign corporation.

1. It is not a State government, or *the* State government, but is another outside or independent government. In regard to this real property in question, it is not claiming under or enforcing its own laws, but is claiming under a will made under and depending upon the laws of another government.

2. If a corporation, it is *not* a New York corporation, but an outside corporation, claiming rights under the laws of and within the territory of the State government.

Acts of Congress in a State, or in States courts, are foreign laws.

United States Bank *vs.* Stearns, 15 Wend., 315–316.

Corporations created under the laws of the United States are in the several States foreign corporations.

Cooke *vs.* National Bank of Boston, 50 Barb., 339.

Bowen *vs.* First National Bank of Medina, 34 How. (N. Y.) Pr. Rep., 488.

U. S. Bank *vs.* Stearns, 15 Wend., 315.

If, then, the United States government is for any purpose a corporation, it is not a New York corporation, but is, in the State of New York, a foreign corporation.

And as a government, it is not the New York State government, but another or foreign government.

Conceding then, as the counsel for the plaintiffs in error does, that "whether a foreign government or foreign cor-" poration shall take and hold lands within a State is undoubt-" edly a matter of comity, and not of right," does he not concede the whole case?

By the New York Statute in question (2 R. S., 57, sec. 3) a devise of land can only be to a *person*, and that word, when used in a statute, may be deemed to include a corporation but not a government (see the opinion of Justice Andrews, and the authorities there cited); nor is it claimed that under that statute land can be devised to a foreign corporation.

And without or independent of the statute the land could not be devised at all.

Story on Conflict of Laws, sec. 465–474.
McCormick *vs.* Sullivant, 10 Wheaton, 192.
United States *vs.* Crosby, 7 Cranch, 115.
Kerr *vs.* Moon, 9 Wheaton, 565,
Boyce *vs.* City of St. Louis, 29 Barb., 650.
White *vs.* Howard, 46 N. Y., 144.
Downing *vs.* Marshall, 23 N. Y., 383–385.
Levy *vs.* Levy, 33 N. Y., 123–136–137.
Holmes *vs.* Mead, 52 N. Y., 340.
Cutler *vs.* Davenport, 1 Pick, 86.
1 Jarmin on Wills, 1.

Suppose the New York Statutes had forbidden the disposition of real estate by will or devise entirely, will it be pretended that the devise would be good? And is it not the same in this case? The right to devise, and the right of any person or body to take by devise, must be given by statute or it does not exist; and as the statute does not authorize a devise to a government, a citizen cannot devise land within the State to a government; nor can a government acquire title to it in that way.

The right of the government to take land by grant for a *governmental purpose*, does not include the power or capacity to take by devise.

Jackson *vs.* Hammond, 2 Caine's Cases, 337.

Theological Seminary *vs.* Childs, 4 Paige, 419.
McCartee *vs.* Orphan Asylum, 9 Cow., 437.
United States Const., Art. 10.

The question, therefore, whether the government can or cannot take land by grant is immaterial in this case.

But as the opinion of the Court of Appeals is referred to for the purpose of saving the necessity of making a fuller brief, and in the belief that the reasoning of the judge who delivered the opinion, and the cases therein cited by him, are conclusive, I abstain from further discussing the questions here.

The devise being unauthorized and void, the land descended to the heirs of Charles Fox, the testator, as held by the New York courts; and it is confidently insisted that, if the writ of error shall not be dismissed, the judgment should be affirmed.

JAMES FLYNN,
Counsel for Defts. in Error.

In the Supreme Court of the United States,

OCTOBER TERM, 1876.

THE UNITED STATES,
Plaintiffs in Error,

vs.

ANNIE FOX AND OTHERS,
Defendants in Error.

No. 104.

In Error to the Court of Appeals of the State of New York.

BRIEF FOR THE DEFENDANTS IN ERROR.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1876.

No. 104.

THE UNITED STATES,
Plaintiffs in Error,

vs.

ANNIE FOX AND OTHERS,
Defendants in Error.

Brief for the Defendants in Error.

Statement of Facts.

On the 16th day of July 1864 Charles Fox of the city of New York made his last will and testament, the material portions of which are in the following words: "*First, After all my debts are paid and discharged, the residue of my estate, real and personal, I give, bequeath, and dispose of as follows, to wit: To the Government of the United States at Washington, District of Columbia, for the purpose of assisting to discharge the debt contracted by the war for the subjugation of the rebellious Confederate States, the property located on Third avenue, &c.*" And there-

after on the 2d day of February, 1870, the said testator died. The United States District Attorney for the Southern District of New York then applied by petition to the surrogate of the city and county of New York to admit the said will to probate. The infant heirs of said Fox contested the will. The surrogate decided that the will was "inoperative, invalid, and void as a "devise of real estate," and that the United States were not entitled to and could not lawfully "take, receive, or hold, as "devisee in trust or otherwise, under said last will and testa- "ment, the real estate devised thereby or any part thereof." He also held and decided that the will was good as a will of personal estate, and that the United States were sole legatees, and could take the personal estate as such.

The United States appealed from that decision to the Supreme Court, where the said decree was affirmed. The United States then appealed to the Court of Appeals of the State of New York, where the judgment appealed from was affirmed, and the record was thereupon remitted to the Supreme Court to be enforced as the judgment of that court, and by order of the Supreme Court judgment was then entered in accordance with the decision of the Court of Appeals.

A writ of error to remove the cause to the Supreme Court of the United States for review was then applied for and granted on the grounds:

1. That there "was drawn in question the validity of an "authority exercised under the United States."

2. That there "was drawn in question the validity of a "statute of the State of New York as against the United "States, on the ground of its being repugnant to the Constitu- "tion of the United States, and the decision was in favor of its "validity."

3. That there was "drawn in question the construction of the "Constitution of the United States in respect to its authorizing "the said United States to take real estate devised to it, and "the decision was against the title to said real estate set up and "claimed under said Constitution."

The heirs of said testator, the defendants in error, then moved to dismiss the writ of error for want of jurisdiction, claiming that no such matters or rights were drawn in question, and that neither section 25 of the Judiciary Act, nor the Act of February 5, 1867, gave to the plaintiff in error the right to have the judgment in this case taken to the Supreme Court of the United States for review. The court deferred its decision till the hearing upon the merits.

POINTS ON MOTION TO DISMISS.

I.

"The validity of an authority exercised under the United States," was not drawn in question by the record or proceedings in that cause or proceeding.

As the counsel for the plaintiff in error defines or explains it, he claims that the authority of the secretary of the treasury or other proper officer of the United States, to receive on behalf of the United States, the property real and personal, bequeathed and devised, was questioned, and that the decision was against the validity of such authority.

It does not appear from the record nor from any proceeding in the cause, that any such question was before the court, or that the court decided any such thing.

No authority had been or was being exercised under the United States, or by any officer of the United States. Nothing done by any such officers was held invalid.

The devise was of land situated in the State of New York, and the will was made by a citizen of that State, in pursuance of the *statutes of that State*, and the court simply held that the United States of America was not entitled to and could not lawfully take the real property under *that will*, made in pursuance of the New York statutes, which did not authorize such a disposition by will or devise of real property within its limits.

The acts done were done by the testator and the surrogate, and the only authority exercised was so exercised under the statutes of the State of New York.

There are many cases where the validity of acts done by officers, agents or employés of the General Government are drawn in question in State courts, and the words in the Judiciary Act and Act of 1867. "*Authority exercised under the United States*," has reference to such cases; but it would be a forced and extraordinary construction of the act to hold it to extend to a case where no authority has been exercised under the United States, where no act done by any officer, agent or other person, has been done under the direction of, or in pursuance of, any law of the United States, and where no such act or proceeding has been held invalid.

The act of Congress does not purport to nor was it ever intended to apply to any such case.

This court has uniformly held that to entitle a party defeated in a State court to bring his case to this court for review by writ of error, the case must be brought *clearly* and indisputably within the provisions of the act of Congress.

Ocean Ins. Co. *vs.* Polleys, 13 Peters, 157, 164.
Commercial Bank of Cincinnati *vs.* Buckingham's Exrs., 5 How., 317, 341, 342.
(See other cases cited in the following 3d Point.)

Even if the question had been raised, and the court had held that the secretary of the treasury, or other officer of the United States, could not or had not authority to receive the property devised by that will, that would not have been drawing in question the validity of an authority exercised under the United States, for these among other reasons:

1. No authority has or had been exercised. The statute does not provide for the case of an act not yet done, and which may never be done, or for the case of a decision that an authority cannot be lawfully exercised which has never been, and may never be, exercised or attempted.

2. The question could not arise in this case in any form.

The secretary of the treasury and other officers are but agents of the government. They are not the government. Their authority to receive and hold property belonging to the government, or to do any other act for the government, is simply their commission or power of attorney, and a question of the sufficiency of that cannot, or at least has not, in any form, come in question in this case. The question is a question of *title* of their principal, and not of the sufficiency of the power or authority given to them to act for their principal.

When the question of title is established in their principal, and these officers or agents, in the exercise of the power conferred on them, deal with or dispose of the property, or bring actions to recover it, a question as to the validity of an authority exercised by them, may be brought in question, but not before.

It cannot be necessary to consider this question further. The writ cannot be sustained, because of this assignment or ground of error.

II.

Neither is the second ground or assignment of error warranted by any facts in the case.

There was not drawn in question the *validity* of any statute of the State of New York, nor was any statute of the State held or claimed to be repugnant to the Constitution of the United States. The United States did not claim the property under or because it was given by the Constitution of the United States, nor was the will or devise based upon, authorized, or regulated by the Constitution of the United States.

A statute of the State of New York authorized the disposition of real property within the State, under certain restrictions, and the only right the testator in this case had to dispose of his property by will or devise was given by that statute, as *by the common law he had no such right.*

Vol. 1, Williams on Exrs., 1.

The testator in thus attempting to dispose of his properiy devised it to "the Government of the United States at Washington, District of Columbia," and the question arising on that will was, not whether the statute was *valid* or not, *but whether the statute authorized such a disposition of his property or whether it authorized him to make such a will.* It was a question, as to the meaning and effect of the statute, purely a question of *construction.*

Commercial bank of Cincinnati *vs.* Buckingham's Exrs., 5 How., 317, 341, 342.

The United States did not claim that the statute was *invalid,* but only that the statute as it reads authorized the testator to devise his land to the United States, and to make the United States trustees for their own creditors. The United States were the petitioners offering the will for probate, and were not in a situation to question the validity of the statute, as questioning that would be questioning the validity of the will itself. Suppose on the appeal the United States had claimed and the court had held that the statute was void, the will would have fallen with it. It will thus be seen that the statute was not claimed on the part of the United States to be invalid, and if the validity of the statute had been in question and had been held valid it would not have been a decision against the United States, but on that question would have been in their favor.

Again, it is claimed by the plaintiff in error that the validity of the statute was in question and held valid against the right of the United States, but that it was held valid on the ground that it was *repugnant* to the Constitution.

To be *repugnant* to the Constitution it must be *contrary to* or *opposed to* the Constitution. It must deny to the United States a right which the Constitution gives, and which the United States could exercise, if the statute was not in existence.

Does the United States Constitution provide for the disposition of land in the several States by will or devise?

Are not those State rights governed by and depending on State laws?

Does the Constitution restrict the right of a State to provide for and regulate the disposition of property, within its limits, by will or devise?

There is nothing in the Constitution on the subject, and nothing there for that statute to be repugnant to. It might as well be claimed that a statute of any foreign country, regulating the disposition of its real estate, by will or devise, is repugnant to the Constitution of the United States. There was never such a question in this case.

In the assignment of errors (fol. 8) it is claimed or alleged, *not that the statute is invalid*, but that as *construed by the courts*, it was drawn in question, and that the decision was in favor of its validity *as construed*.

Can there be a more complete *felo de se* than this?

Is there not here an admission that it was a question of the *construction* or *meaning* of a statute, and not a question of its validity?

And, that being so (assuming that there was even a question of construction before the court), the writ must be dismissed for want of jurisdiction, as was done in the case of the Commercial Bank of Cincinnati *vs.* Buckingham's executors, before cited, 5 How., 341, 342.

III.

The other ground or assignment of error has still less to support it. It is there alleged that the construction of the Constitution was drawn in question, in respect to its authorizing the United States to take real estate devised to it.

What clause of the Constitution was drawn in question? The plaintiff in error does not point out any, nor does the record show any.

The act of 1867, which supersedes or has repealed the provisions of sec. 25 of the Judiciary Act, does not provide for assigning such a ground of error. But assuming that to be a proper assignment of error, there are these reasons why that

ground of error is not good or sufficient to give this court jurisdiction to review the judgment in this cause by writ of error.

1. The writ and assignment of error should show what clause of the Constitution has been construed or drawn in question, or at least the *record* should.

   Gibson *vs.* Chauteau, 8 Wallace, 314.
   Railroad Co. *vs.* Rock, 4 Wallace, 177.
   Suydam *vs.* Williamson, 20 How., 427.
   Christ's Church *vs.* Co. of Philadelphia, 20 How., 26.
   Taylor *vs.* Morton, 2 Black, 481.

2. It is not sufficient even that such a question might have been raised, or even that such a question was argued, but the *record must show* that the question was in fact *raised* and *necessarily* decided.

   The Ocean Ins. Co. *vs.* William Polleys, 13 Peters, 157.
   Crawford *vs.* Branch Bank of Mobile, 7 How., 279.
   Mills *et al. vs.* Brown *et al.*, 16 Peters, 525.
   Commercial Bank of Cincinnati *vs.* Buckingham, 5 How., 341.
   Murdock *vs.* City of Memphis, 20 Wallace, 590.
   Lawler *vs.* Walker, 14 How., 149.
   Parmalee *vs.* Lawrence, 11 Wallace, 38.
   R. R. Co. *vs.* Rock, 4 Wallace, 177.

How or where does it appear in the record in this case that any clause of the Constitution was in question or construed?

It is said in the assignment of errors that the construction of the Constitution was drawn in question "in respect "to its authorizing the said United States to take real "estate devised to them" (fol. 8).

An examination of the record will show not only that the construction of the Constitution was not thus drawn in question, but that no such question was decided.

The decision of the surrogate (fol. 138), which was affirmed, was, that the United States could not take the real estate devised by *that will*, and that as a devise of real estate *that will* was void. It was not decided that the United States could not take real estate devised to them, or that the United States could not be a devisee, but simply that the statutes of the State of New York did not authorize a devise of land situated in that State to the United States of America, or, as expressed in the will, "to "the Government of the United States at Washington." That is what the surrogate decided, and all that the record shows.

Looking further at the opinions of the courts on appeal, which, however, are no part of the record (51 N. Y. Rep., 355; 36 N. Y. Rep., 316; 13 Peters, 164, 165; 8 Wall., 317), it will be seen that both the appellate courts were of the opinion that, under the common law, or under the New York Statutes, the United States could not, as devisee, take the land, not that the Constitution of the United States did, or did not, authorize it.

Justice Andrews, in delivering the opinion of the Court of Appeals in the case, says: "It is not necessary in this "case to decide whether the United States could, with the "consent of a State, accept a devise of lands made to it "directly and unaccompanied by any trust. In view of "the origin and nature of the power to devise lands, of the "right of each sovereignty to determine the limitations "under which this power shall be exercised, and of our "statute upon the subject, the devise to the United States "in the will in question cannot be sustained" (52 N. Y., 533.)

It must be apparent, without further argument, that there was *not* "drawn in question the construction of the Constitution of the United States," and that the jurisdiction of this court cannot be invoked or retained because of that or any such question in this case.

Nor is it true, as averred and set forth in the writ of error, that "the decision was against the title to said real "estate, set up and claimed *under the Constitution*." No

title was set up or claimed *under the Constitution*. The title was set up and claimed under the *Statutes of the State of New York* and the will.

To sum up, the United States voluntarily comes into the courts of the State of New York and asks them to adjudge the title to certain lands to be in the United States, by virtue of a will made in pursuance of the laws of the State.

The State Courts all through say they cannot so adjudge, because the State has never authorized or empowered any of its landholders to make such a disposition of land within its limits; that their Statute of Wills, as they understand and interpret it, does not permit such a devise to be made.

Now, can this court, in the face of its repeated adjudications, review that decision, construing and interpreting the State law at the special instance and request of the United States?

Points on the Merits.

I.

The State of New York is a sovereign state (4 Cranch, 209; 3 Cow, 686); it is the original owner of the soil in the State (N. Y. Const., Art. I, sec. 11); and, except in these cases where jurisdiction is ceded, it has the sovereign and *only* right to make laws relating to land within its territory, (47 N. Y., 467; 4 McLean, 230; 19 Wallace, 676; 17 Johns, 225; 20 How, 558; 5 Peters, 398; 1 Woodbury & Minot, 76–80; 1 Kent, Com., 430. There can be no pretence that the State has surrendered the right to regulate and control the transmission of land by will or devise. (52 N. Y., 534).

The Statute of Wills is an *enabling act*—it authorized and empowered a person to do that which he had no right or authority to do before; it provided to whom and in what manner a devise should be made. A person must therefore devise as the statute permits or he cannot devise at all. (Downing *v.* Marshall, 23 N. Y., p. 385.)

The validity of a devise of land situated within a State, and the capacity or incapacity to devise, depend upon and are governed by the statutes and judicial decisions of that State alone.

Story on Conflict of Laws, sec. 465–474.
McCormick *vs.* Sullivant, 10 Wheaton, 192.
United States *vs.* Crosby, 7 Cranch, 115.
Kerr *vs.* Moon, 9 Wheaton, 565.
Boyce *vs.* City of St. Louis, 29 Barb., 650.
White *vs.* Howard, 46 N. Y., 144.
Levy *vs.* Levy, 33 N. Y., 123, 136, 137.
Aicardi *vs.* The State, 19 Wallace, 635.

The statute is regulating the transmission of lands in the State of New York, and means to say that no one shall devise lands in that State unless he gives them to such *natural* persons as are by law capable of holding by devise, or to such corporations as the State has *expressly* authorized, by charter or by statute, to take by devise. (Holmes *vs.* Mead, 52 N. Y., p. 340.) In this case the only question before the New York Courts was, as to the meaning of the statute; and it is a well-settled principle of this court, that it will follow, and feels itself bound by the construction of State courts on questions affecting the title to real property in the State (13 Wallace, 306).

II.

The United States take land by grant for a public use, and it is argued—why not by devise?

The United States exist under and by virtue of a written constitution; they have such *express powers* as are given by that instrument and such *implied powers* as are *necessary* to carry into effect the powers expressly granted; they have no additional rights or powers, for the constitution expressly reserves to the States respectively the powers not thereby delegated.

U. S. Const., Art. 10.
Story on the Const., sec. 1238.
1 Kent, Com., Lec. 12, p. 251–254.

Among the express powers of the government is not the power to take by devise; if the power exists, it exists by implication; and we submit that no powers in the government can be implied, except such as are necessary to carry into effect the powers expressly granted, and that "if the experience of a century in peace and war has demonstrated anything it is that the" government can exist without the power to take by devise; and that the right to take by devise is not necessary to carry into effect any express power of the government. (1 Kent, Com., 254; Story on the Const., sec. 1239.)

By an Act of Congress, passed May 1, 1820 (Rev. Stat., sec. 3,736), it was enacted that "No land shall be purchased on account of the United States, except under a law authorizing such purchase."

When, therefore, it is ascertained by Congress that the United States require land for a governmental purpose, then, *under their implied powers*, they would undoubtedly have the right to take land by grant; but the right of the government to take land by grant for a *governmental purpose*, does not include the power or capacity to take by devise.

Jackson *vs.* Hammond, 2 Caine's Cases, 337.
Theological Seminary *vs.* Childs, 4 Paige, 419.
McCartee *vs.* Orphan Asylum, 9 Cow.. 437.
Downing *vs.* Marshall, 23 N. Y., 383.

III.

The United States have no common law (8 Peters, 658). The learned counsel for the government insists, however, that certain common law prerogatives of the King of England extend to and inhere in the United States, and for that reason they are not affected by the Statutes of New York.

There is no analogy between the position assumed by the counsel for the government and the principle, that "the king is not bound by any Act of Parliament, unless he be named therein by special and particular words." When the principle

stated extends at all, *it only extends to the sovereign or power by or under which the law was enacted* (3 Keyes, 125).

The State of New York is sovereign for every purpose, except for those purposes which she has surrendered to the United States.

The United States are sovereign for a limited purpose; within its proper sphere, the sovereignty of either is independent of the other (21 How., 506). The United States are not claiming this real property under or by virtue of their own laws, but are claiming it under a will, made in pursuance of and depending upon the laws of a separate and distinct sovereignty, and they are as much bound by those laws as any foreign state or nation would be.

Fox *vs.* Ohio, 5 How., 410.
Mayor of New York *vs.* Miln, 11 Peters, 102.
Barker *vs.* The People, 3 Cow., 686.

Where a statute is general, and thereby any prerogative, right, title or interest is *divested or taken* from the king, in such case the king shall not be bound, unless the statute is made to extend to him; but when the statute is for the public good, the advancement of religion and justice, and to prevent injury and wrong, and does not interfere with the established rights of the crown, the king is bound by such Act, though not particularly named therein (1 Black. Com., 261; Vol. 8, Bacon's Abr. Prerogative, E. 5, p. 92).

The common law did not recognize the right of testamentary disposition of land; the Statute of Wills conferred a limited power to devise; the law existed before the formation of the government; the United States exist under limited grants of power. Now, what prerogative, right, title or interest of the United States did the statute *divest or take away?* It could not "divest or take" that which they never possessed.

It has been held that the statute *de donis* extends to and binds the king.

Vol. 8, Bacon's Abr. Prerogative E. 5, p. 92.

And so the king is bound by the statute which restrains ecclesiastical persons from making leases, &c.

And so the king is bound by the Statute of Merton, made against usury, in doubling the rent, in case of an infant heir who has made default in payment.

And so the king is bound by the statute against simony.

And so the king is bound, though not named, by the statute against voluntary conveyances to defraud purchasers; so that a voluntary conveyance to the king is as much void against a subsequent purchaser for a valuable consideration as in the case of a common person.

Id.

The State of New York has excluded subscribing witnesses to a will from taking thereunder (2 R. S., Edm. Ed., 66, § 50), and like others of her sister states, she has restricted testators in certain cases from giving by will to any charitable or other society, more than one-half of their property, after the payment of debts (Edmonds Stat. at Large, Vol. 4, p. 504).

Now, if the State has the right to restrict the giving of any portion, why not the whole? And suppose the New York Statutes had forbidden the disposition of real property by will or devise entirely. Will it be pretended that the devise would be good? And is it not the same in this case? The right to devise and the right of any person or body to take by devise, must be given by statute, or it does not exist; and as the statute does not authorize a devise to the government, a citizen cannot devise land within the State to the government, nor can the government acquire title to it in that way.

IV.

It is a well settled rule of law that when a testator has made

an invalid or ineffectual disposition of his property, his heirs take it as undisposed of.

Van Kleeck *vs.* Dutch Church, 20 Wend., 457–469.

Levy *vs.* Levy, 33 N. Y., 97–103.

V.

It is most confidently insisted that if the writ of error shall not be dismissed, the judgment should be affirmed.

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